

No. 13122

**United States
Court of Appeals**
for the Ninth Circuit.

UNITED STATES OF AMERICA, R. P. JANDL,
as Administrator of the Estate of William F.
Leland, Deceased, and C. W. BREAKIRON,
Successor Receiver for Atlantic and Pacific
Airlines,

Appellants,

vs.

EAGLE STAR INSURANCE COMPANY,
LIMITED; ORION INSURANCE COM-
PANY, LIMITED; THE DRAKE INSUR-
ANCE COMPANY, LIMITED, Subscribing
Underwriting Members of Lloyd's, London,

Appellees.

Transcript of Record

In Two Volumes

Volume I

(Pages 1 to 270)

Appeal from the United States District Court for the
Western District of Washington,
Northern Division.

FILED

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PAUL P. O'BRIEN

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the District Court of the United States for the
Western District of Washington, Northern
Division

No. 2401

THE UNITED STATES OF AMERICA and
R. P. JANDL, as Administrator of the Estate
of WILLIAM F. LELAND, Deceased,

Plaintiffs,

vs.

EAGLE STAR INSURANCE COMPANY, LIM-
ITED; ORION INSURANCE COMPANY,
LIMITED; THE DRAKE INSURANCE
COMPANY, LIMITED, Subscribing Under-
writing Members of Lloyd's, London,

Defendants.

COMPLAINT

Plaintiffs allege:

I.

Plaintiff R. P. Jandl is the duly qualified and acting Administrator of the Estate of William F. Leland (hereinafter called Leland) deceased, appointed in Probate Cause No. 109506 in this court, and brings this action pursuant to court order duly entered in that cause.

II.

Each of the defendants above named is an alien and is a subscribing underwriting member of Lloyd's, London, under Lloyd's Certificate

W-OMA-253, Lloyd's, London, being a copartnership or unincorporated association engaged in the business of writing insurance in King County, Washington. Exclusive of interest and costs, the matter in controversy exceeds the sum of \$3,000.00.

III.

On July 21, 1948, the defendants, through the office of D. K. MacDonald & Company of Seattle, Washington, issued to Leland Certificate No. W-OMA-253, including endorsements numbered 1 to 6, inclusive, attached thereto and forming a part thereof, insuring one certain Douglas DC-3 airplane, No. NC 79025 against accidental loss of or damage to the aircraft while on flight or on the ground, including any equipment or accessories while attached to and forming a part of the aircraft, as set forth in the certificate, a copy of which is hereto attached marked Exhibit A and made by this reference a part hereof. At the time of the accident hereinafter referred to all premiums on such certificate were fully paid, and it was in full force and effect. At all times herein mentioned Leland was the owner of the aircraft described in and covered by the certificate above mentioned.

IV.

At all times herein mentioned the plaintiff United States of America was holder of a note the payment of which was secured by a mortgage covering the above-described aircraft. Said mortgage is referred to and described in that certain creditor's claim filed in the estate of Leland by the Government, a copy

of which claim is marked Exhibit B and attached hereto. Since that claim was filed defendants have made a payment to the United States of America of \$3,305.33 which was applied on the principal amount of the note on August 19, 1949. The unpaid principal balance now owing on the note is \$1,906.24 and there is also owing \$24.09 interest which accrued to January 2, 1949; 4 per cent interest on the sum of \$5,211.57 from January 3, 1949, to August 19, 1949, and 4 per cent interest on \$1,906.24 from August 20, 1949, until paid.

Under the insurance certificate, loss resulting from loss or damage to the aircraft insured is payable to the Treasurer of the United States for the account of all interests.

V.

On January 2, 1949, the aircraft above referred to crashed and burned in an attempted takeoff at Boeing Field, King County, Washington, resulting in the complete destruction of such aircraft and of all equipment and accessories attached thereto and forming a part thereof, except for salvage from all of the foregoing to the value of \$390.20. The actual agreed value of the aircraft, as provided in the certificate above mentioned, was \$25,000.00.

VI.

On January 5, 1949, which was as soon as practicable after the accident above mentioned, plaintiff R. P. Jandl through his attorneys gave written notice thereof to D. K. MacDonald & Company,

Hoge Building, Seattle 4, Washington, on behalf of the estate of Leland, who was killed in the accident above mentioned; a copy of such notice is attached hereto as Exhibit C and made by this reference a part hereof. Although plaintiffs made repeated demands on the defendants for payment of the sum due on the certificate, defendants have failed and refused to pay any part thereof other than the \$3,305.33 payment to the United States of America mentioned above. The sum now due, after deducting this \$3,305.33 payment, the salvage value of \$390.20, and the amount of \$1,250.00 deductible under the certificate, is \$20,054.47, with interest thereon at the rate of 6 per cent per annum from January 2, 1949.

Wherefore, plaintiffs pray for judgment against the defendants and each of them in the sum of \$20,054.47, plus interest thereon at six per cent (6%) from January 2, 1949, until paid, and for their costs and disbursements herein.

/s/ J. CHARLES DENNIS,
U. S. District Attorney.

HOUGHTON, CLUCK,
COUGHLIN & HENRY,
Attorneys for
R. P. Jandl, Administrator.

State of Washington,
County of King—ss.

R. P. Jandl, being first duly sworn, upon oath deposes and says: I am one of the plaintiffs above named. I have read the foregoing Complaint, know the contents thereof and believe the same to be true.

/s/ R. P. JANDL.

Subscribed and sworn to before me this 17th day of October, 1949.

[Seal] /s/ PAUL COUGHLIN,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Endorsed]: Filed October 19, 1949.

[Title of District Court and Cause.]

ANSWER

Come now the defendants and in answer to the complaint of the plaintiff herein, admit, deny and allege as follows:

I.

Answering Paragraph I of said complaint, defendants admit that R. P. Jandl is the duly qualified and acting administrator of the Estate of William F. Leland, deceased. Defendants are without knowledge or information sufficient to form a belief as to the truth of the other allegations contained in said paragraph and therefore deny the same.

II.

Answering Paragraph II of said complaint, defendants admit that they are the subscribing underwriters under Lloyd's certificate W-OMA-253, that said defendants are subjects of the British Empire, and that exclusive of interest and costs the matter in controversy exceeds the sum of \$3,000.00. Except as herein specifically admitted, defendants deny each and every other allegation contained in said paragraph.

III.

Answering Paragraph III of said complaint, defendants admit that on July 21, 1948, they issued certificate W-OMA-253 to William F. Leland insuring one certain Douglas DC-3 airplane No. NC 79025 as provided in said certificate and admit that Leland was the owner of the aircraft described in said certificate. Except as herein specifically admitted, defendants deny each and every other allegation contained in said paragraph.

IV.

Answering Paragraph IV of said complaint, defendants admit that the plaintiff, United States of America, was the holder of a note the payment of which was secured by a mortgage covering the hereinbefore described aircraft, that said mortgage is referred to and described in that certain creditor's claim filed in the Estate of William F. Leland by the United States of America, and that the defendants have made a payment to the United States of America in the amount of \$3,305.33 under said

certificate of insurance and particularly under Endorsement No. 6 which provides that:

“In case of loss or damage on account of or during a breach of any warranties and/or conditions of this policy and/or security instruments with respect to aircraft in the custody or possession of the purchaser, this policy shall, nevertheless, fully cover the United States of America, acting by and through the War Assets Administrator, against loss or damage covered by any of the perils insured against, but the liability of the insurer for any such loss shall not exceed the unamortized balance due on any chattel mortgage or on any note or security instrument, less unearned interest and unpaid installment due prior to the date of the loss or accident, if any, after the United States of America, acting by and through the War Assets Administrator, has exhausted all reasonable means to reduce such balance by attempting to collect amounts due from the purchaser and/or such other securities as they may have.”

Defendants are without knowledge or information sufficient to form a belief as to the truth of the other allegations contained in said paragraph and therefore deny the same.

V.

Answering Paragraph V of said complaint, defendants admit that on January 2, 1949, the aircraft above referred to crashed and burned in an attempted takeoff at Boeing Field, King County,

Washington, and that said aircraft suffered severe damage as the result of such happening and admit that the actual and agreed value of said aircraft is as provided in said certificate of insurance. Defendants are without knowledge or information sufficient to form a belief as to the truth of the other allegations contained in said paragraph and therefore deny the same.

VI.

Answering Paragraph VI of said complaint, defendants admit that on January 5, 1949, plaintiff R. P. Jandl, through his attorneys, gave written notice of the accident to D. K. MacDonald & Company, Hoge Building, Seattle 4, Washington, on behalf of the estate of Leland, who was killed in the accident above mentioned, and that a copy of such notice is attached to the complaint as Exhibit C. Defendants also admit that they denied liability because of said happening under said certificate of insurance for other than the sum of \$3,305.33, which has heretofore been paid to the plaintiff United States of America. Except as herein specifically admitted, the defendants deny the allegations contained in said paragraph, and specifically deny that the sum of \$20,054.47 or any other greater or lesser sum is due to the plaintiffs from these defendants.

For further answer to said complaint and by way of affirmative defense thereto, defendants allege:

I.

That said policy under "General Conditions," paragraph 3, further provides:

"3. The assured shall use due diligence and do and concur in doing all things reasonably practicable to avoid or diminish any loss of or damage to the property hereby insured and in the event of the aircraft sustaining damage covered by this certificate and/or policy, the assured or his/their accredited agents shall forthwith take such steps as may be necessary to insure the safety of the damaged aircraft and its equipment and accessories."

That at the time of the takeoff and crash hereinabove referred to, said assured failed and neglected to use due diligence and do and concur in doing all things reasonably practicable to avoid said crash and the damage to said airplane in the following particulars:

1. That said assured caused said airplane to be loaded in excess of the maximum takeoff weight limit permitted by the operation limitations of said airplane and the rules and regulations of the Civil Aeronautics Authority covering the carrying of passengers in planes of the type insured under said policy.

2. That said assured permitted an accumulation of ice and frost upon wings of said aircraft, which

condition increased the basic empty weight of said aircraft and decreased the lifting qualities of its wings, rendering said airplane dangerous and unsafe to fly and notwithstanding full knowledge of the existence of said ice and frost upon the wings of said aircraft, said assured and his authorized agents and employees permitted and directed the attempted takeoff and flying of said airplane at the time of the crash hereinabove referred to.

3. That said assured and his authorized agents and employees permitted and directed the attempted takeoff and flying of said airplane at a time when they knew or in the exercise of due diligence should have known that conditions of visibility and weather were below the minimum requirements of the Civil Aeronautics Authority for the type of airplane described in said policy and the type of operation which the assured was conducting and at a time when visibility and weather conditions were such as to make a takeoff dangerous and unsafe.

II.

That said policy under "General Conditions," paragraph 2, provides as follows:

"The aircraft shall be operated at all times in accordance with the operations authorized as set forth in the operations record of the aircraft."

That said assured violated and disregarded the above-quoted condition of said policy in that said airplane at the time of said crash and during the

takeoff immediately preceding said crash was loaded in excess of the maximum takeoff load permitted by the operations record and limitations of said aircraft; that the lifting qualities of its wings were decreased by the accumulation of ice and frost on said wings, which conditions existed at the time of takeoff and continued up to the time of the aforesaid crash.

III.

That said policy under "General Conditions," paragraph 1, further provides:

"1. At the commencement of each flight, the aircraft shall have a valid and current airworthiness certificate issued by the Civil Aeronautics Authority. The requisite log books shall be kept fully completed and up to date and such documents shall be produced to D. K. MacDonald & Company for Underwriters at any reasonable time should they so require in support of all or any claims hereon."

That at the time of the takeoff and crash of the airplane hereinabove referred to, said assured violated and disregarded the terms and conditions of said policy as set forth in said paragraph in the following particulars:

1. That the certificate of airworthiness issued to said assured covering the insured airplane provides that said aircraft "is considered airworthy when operated in accordance with the applicable aircraft operation limitations and maintained in accordance with the Civil Air Regulations"; that said airplane

was not so operated by the assured at the time of the takeoff and crash hereinabove referred to in that by reason of an overload placed upon said airplane by the assured the takeoff weight of said airplane exceeded the permissible and authorized takeoff weight as set forth in the operation limitations of said plane; that the ice and frost which the assured permitted to accumulate on the wings of said plane in addition to increasing the weight of the airplane, decreased the lifting qualities of the wings and in effect changed the overall basic design thereof; that the violation by the assured of said airworthiness certificate rendered said airplane unairworthy and invalidated and suspended during the existence of said violations said airworthiness certificate.

2. That the assured failed and neglected to keep fully completed and up to date the log books of said airplane as required by the regulations of the Civil Aeronautics Authority.

IV.

That said policy further provides:

“General Exclusions

“This certificate and/or policy does not cover:

“1. Any loss, damage or liability arising from:

* * *

“(b) The use of the aircraft for any purpose or piloting by any person other than for the purposes and by the pilot or pilots described in the Schedule, or outside the geographical

limits named therein, unless due to force majeure.”

In the operation of said plane on the date of the accident, the operations department of the assured had made provision to change crews at a point distant more than 8 hours from Seattle; that assured violated Civil Air Regulations in that the contemplated flight to the point where the crew would be changed required three qualified pilots whereas only two qualified pilots were on board; that the defendant operated this flight within the purview of exclusion No. 1 set forth in the policy in that the assured, W. F. Leland, was the third pilot on board and was not approved by the insurers as required under the terms of the policy.

V.

That said policy contains the following provisions:

“General Exclusions

“This certificate and/or policy does not cover:

“1. Any loss, damage or liability arising from:

* * *

“(c) The use of the aircraft for closed course racing or student instructions unless such use is specifically approved in the Schedule or any flying in which a waiver issued by the Civil Aeronautics Authority is required unless with the express written consent of D. K. MacDonald & Company for the Underwriters.”

That at the time of said takeoff and crash, said

plane had not been lined and upholstered with fire resistant materials as required by the regulations of the Civil Aeronautics Authority; that to fly said airplane without complying with said regulations required a waiver from the Civil Aeronautics Authority; that the assured had not at the time of said takeoff and crash or at any time prior thereto obtained the consent of D. K. MacDonald & Company for the Underwriters to so operate said airplane as required by the above-quoted provisions of said certificate and/or policy; that assured violated the above exclusion in that said airplane at the time of takeoff was overloaded, had ice and frost on its wings that aggravated the overloading condition as well as decreased the lifting qualities of its wings; and that said plane took off under weather conditions below minimum for a non-scheduled carrier and was in violation of Civil Aeronautics Regulations in respect to the necessary pilot qualifications required under the conditions of flight herein and in violation of Civil Aeronautics Regulations in connection with the airworthiness certificate, all of which matters are hereinafter more particularly set forth and alleged herein, and in connection with which matters no waiver was issued by the Civil Aeronautics Authority and with reference to which at no time did D. K. MacDonald & Company for the Underwriters give their written consent.

VI.

That the defendants, notwithstanding the foregoing breaches and violations of the terms and con-

ditions of said certificate, have by reason of Endorsement No. 6 attached to said policy (mortgagee endorsement) paid to the plaintiff United States of America the sum of \$3,305.33, which is the entire unamortized balance due the United States of America on its said note and mortgage less unearned interest and unpaid installments due prior to the attempted takeoff and crash of said airplane on January 2, 1949.

VII.

That by reason of the foregoing, plaintiffs are not entitled to recover under said certificate or policy of insurance.

Wherefore, having fully answered, defendants pray that plaintiffs take nothing by their complaint herein and that the defendants have and recover of and from the plaintiffs their costs and disbursements herein.

/s/ JULIAN O. MATTHEWS,

Of Macbride, Matthews & Hanify, Attorneys for Defendants Eagle Star Insurance Company, Limited; Orion Insurance Company, Limited; The Drake Insurance Company, Limited; Subscribing Underwriting Members of Lloyd's, London.

Receipt of Copy acknowledged.

[Endorsed]: Filed November 29, 1949.

[Title of District Court and Cause.]

REPLY

Plaintiffs make the following reply to defendants' affirmative defense:

I.

Replying to Paragraphs I, II, IV and V of the affirmative defense, plaintiffs admit that the policy contains the language quoted therein. Plaintiffs deny each and every other allegation of those paragraphs.

II.

Replying to Paragraph III of the affirmative defense, plaintiffs admit that the policy contains the language quoted therein. Referring to the allegation in subdivision 1 of Paragraph III of the affirmative defense relating to alleged language of the certificate of airworthiness, plaintiffs do not have information sufficient to enable them to determine the truth or falsity thereof and therefore deny the same. Plaintiffs deny each and every other allegation of Paragraph III.

III.

Replying to Paragraph VI of the affirmative defense, plaintiffs admit that defendants paid to plaintiff United States of America \$3,305.33, which is the entire and amortized balance due the United States of America on its note and mortgage, less unearned interest and unpaid installments due prior to January 2, 1949. Plaintiffs deny each and every other allegation of Paragraph VI.

IV.

Replying to Paragraph VII of the affirmative defense, plaintiffs deny each and every allegation thereof.

/s/ J. CHARLES DENNIS,
U. S. District Attorney.

HOUGHTON, CLUCK,
COUGHLIN & HENRY,
Attorneys for R. P. Jandl,
Administrator.

State of Washington,
County of King—ss.

R. P. Jandl, being sworn, says: I am one of the plaintiffs above named; I have read the foregoing Reply, know the contents thereof and believe the same to be true.

/s/ R. P. JANDL.

Subscribed and sworn to before me this 24th day of February, 1950.

[Seal] /s/ ROLLA V. HOUGHTON,
Notary Public in and for the State of Washington,
Residing at Seattle.

Receipt of Copy acknowledged.

[Endorsed]: Filed March 2, 1950.

[Title of District Court and Cause.]

REQUEST FOR ADMISSION
UNDER RULE 36

Defendants Eagle Star Insurance Company, Limited; Orion Insurance Company, Limited; The Drake Insurance Company, Limited, subscribing underwriting members of Lloyd's, London, request plaintiffs The United States of America and R. P. Jandl, as Administrator of the Estate of William F. Leland, Deceased, within ten days after service of this request, to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial:

1. That each of the following statements is true:
 - a. That the airplane described in plaintiff's complaint No. NC 79025 was licensed under Department of Commerce Civil Aeronautics Administration Certificate of Airworthiness (Form A.C.A. 1362) which provides: "This aircraft has been inspected by a representative of the Administrator and is considered airworthy when operated in accordance with the applicable aircraft operation limitations and maintained in accordance with the civil air regulations."
 - b. That on January 2, 1949, Form A.C.A. 309, Department of Commerce, Civil Aeronautics Administration, "Aircraft Operation Record" had been replaced for airplanes licensed under Form A.C.A. 1362 by Form A.C.A. 309a, Department of Commerce, Civil Aeronautics Administration, "Opera-

tion Limitations.” That each of said forms prescribed a maximum permitted takeoff weight for the airplane for which such form was made out.

c. That under the “Operation Limitations” prescribed on Form A.C.A. 309a by the Civil Aeronautics Administration for airplane No. NC 79025 the maximum permitted takeoff weight for said airplane when carrying passengers was 25,346 pounds.

d. That the dry weight of airplane No. NC 79025 without passengers, baggage, fuel or lubricating oil at the time of the attempted takeoff described in the complaint was 17,696 pounds.

e. That there were 30 persons including passengers and crew members aboard airplane No. NC 79025 at the time of the attempted takeoff described in the complaint.

f. That at the time of the attempted takeoff described in the complaint, airplane No. NC 79025 was engaged in “instrument flight operations” as defined in Section 42.36 of Title 14, 1949 Edition of Code of Federal Regulations.

g. That a Department of Commerce, Civil Aeronautics Administration Flight Plan form signed by Chavers, pilot of airplane No. NC 79025 at the time of the takeoff described in the complaint was filed on behalf of the decedent Leland to cover the intended flight which ended in crash at the Interstate Airways Communication Station, Boeing Field, containing the following information: Aircraft identification number, 79025; color of aircraft, silver; name of pilot, Chavers; pilot’s or flight comman-

der's address, Des Moines, 4442; certificate number of pilot or flight commander, 124873; point of departure, Seattle; cruising altitudes and route to be followed, 9,000, green area 2 to Helena, route area No. 48 to Livingston, green 2 to Billings; first point of intended landing, Billings; proposed true air speed at cruising altitude, 165 miles per hour; proposed time of departure 1945 subsequently corrected to 2100; actual time of departure, blank; estimated elapsed time, 4 hours, 15 minutes; alternate airport, Helena; fuel on board, 600 gallons; transmitting frequency, 3105, 6210; and that the statements of intention therein contained were true statements of intention as to said flight and that the statements of fact therein contained were true statements of fact pertaining to the attempted takeoff and flight described in the complaint herein.

h. That at the time of the attempted takeoff described in the complaint, the visibility at Boeing Field was reported by the U. S. Weather Bureau to be one-fourth mile.

i. That a few minutes before the attempted takeoff described in the complaint the airport traffic controller in the tower at Boeing Field told the pilot of No. NC 79025 over the radio that the visibility was one-fourth mile.

j. That the propeller log books for airplane No. NC 79025 contained no entries pertaining to the propellers installed on said airplane at the time of the attempted takeoff described in the complaint and if said log books had been kept up to date there would have been entries therein pertaining to the propellers thereon.

k. That the last entry in the engine log books for airplane No. NC 79025 was made April 21, 1948, and did not pertain to either engine installed on said airplane at the time of the attempted takeoff described in the complaint and if said log books had been kept up to date there would have been entries therein pertaining to the engines thereon.

l. That the last inspection notation in the aircraft log for airplane No. NC 79025 was made January 13, 1947, and the last trip notation therein was October 22, 1948, and if said log book had been kept up to date there would have been subsequent entries therein.

m. That only two pilots permitted to fly airplane No. NC 79025 under the provisions of the insurance policy described in the complaint were on board at the time of the attempted takeoff described in the complaint and that said pilots were scheduled to fly said airplane for more than 8 hours without a rest period during the 24 hours after the takeoff described in the complaint.

n. That on January 2, 1949, at the time of the attempted takeoff described in the complaint, William F. Leland was operating airplane No. NC 79025 under operating certificate No. 7-73 issued by the Department of Commerce, Civil Aeronautics Administration, which authorized him to conduct non-scheduled air carrier operations in multi-engine land airplanes.

o. That at the time of the attempted takeoff described in the complaint the decedent Leland had not modified said airplane to meet the fireproofing

standards established by the regulations of the Civil Aeronautics Administration and that said regulations required the fireproofing standards to be complied with by November 1, 1948, unless a waiver as to compliance was obtained by said date.

p. That in accordance with special regulation No. 309 of the Civil Aeronautics Administration the decedent Leland applied to the Civil Aeronautics Administration for a waiver as to his complying with the requirement that he modify airplane No. NC 79025 to meet the fireproofing standards of the Civil Aeronautics Administration regulations prior to November 1, 1948, which waiver was granted and was in force and effect on January 2, 1949.

q. That neither the decedent Leland nor anyone in his behalf applied to D. K. MacDonald & Company or received from D. K. MacDonald & Company consent to operate airplane No. NC 79025 while said waiver was in force and effect.

/s/ JULIAN O. MATTHEWS,
Of Macbride, Matthews & Hanify, Attorneys for
Defendants Eagle Star Insurance Company,
Limited; Orion Insurance Company, Limited;
The Drake Insurance Company, Limited, Sub-
scribing Underwriting Members of Lloyd's,
London.

Receipt of Copy acknowledged.

[Endorsed]: Filed September 8, 1950.

[Title of District Court and Cause.]

AMENDED COMPLAINT

First Claim

Plaintiffs allege:

I.

Plaintiff R. P. Jandl is the duly qualified and acting Administrator of the Estate of William F. Leland, deceased, appointed in Probate Cause No. 109506 in the Superior Court of the State of Washington for King County, and brings this action pursuant to court order duly entered in that cause.

II.

Each of the defendants above named is an alien and is a subscribing underwriting member of Lloyd's, London, under Lloyd's Certificate W-OMA-253, Lloyd's, London, being a copartnership or unincorporated association engaged in the business of writing insurance in King County, Washington. Exclusive of interest and costs, the matter in controversy exceeds the sum of \$3,000.00.

III.

On July 21, 1948, the defendants, through the office of D. K. MacDonald & Company of Seattle, Washington, issued to William F. Leland Certificate No. W-OMA-253, including endorsements numbered 1 to 6 inclusive attached thereto and forming a part thereof, insuring one certain Douglas DC-3 airplane #NC 79025 as set forth in the certificate, a copy of which is hereto attached marked Exhibit

A and made by this reference a part hereof. At the time of the accident hereinafter referred to all premiums on such certificate were fully paid, and it was in full force and effect. At all times herein mentioned William F. Leland was the owner of the aircraft described in and covered by the certificate above mentioned.

IV.

At all times herein mentioned the plaintiff United States of America was holder of a note, the payment of which was secured by a mortgage covering the above-described aircraft. The note and mortgage are referred to and described in that certain creditor's claim filed in the Estate of William F. Leland by the Government, a copy of which claim is hereto attached marked Exhibit B and made by this reference a part hereof. Since that claim was filed defendants have made a payment to the United States of America of \$3,305.33 which was applied on the principal amount of the note on August 19, 1949. The unpaid principal balance now owing on the note is \$1,906.24 and there is also owing \$24.09 interest which accrued to January 2, 1949, 4% interest on the sum of \$5,211.57 from January 3, 1949, to August 19, 1949, and 4% interest on \$1,906.24 from August 20, 1949, until paid.

Under the insurance certificate, loss resulting from loss or damage to the aircraft insured is payable to the Treasurer of the United States for the account of all interests.

V.

Plaintiff C. W. Breakiron is the duly qualified and acting Successor Receiver for Atlantic and Pacific Airlines, appointed in the case of Andrew J. Burke v. Lester Lamb, Cause No. 68884, District Court of Galveston County, Tenth Judicial District, State of Texas, and joins in this action pursuant to court order duly entered in that cause. At all times herein mentioned plaintiff and his predecessors and assignors held, and plaintiff now holds, a note, the payment of which was secured by a mortgage covering the above-described aircraft. The note and mortgage are referred to and described in that certain creditor's claim filed by plaintiff's predecessor as receiver for Atlantic and Pacific Airlines in the Estate of William F. Leland. A copy of that claim is hereto attached marked Exhibit C and made by this reference a part hereof. The unpaid principal amount now owing on the note is \$9750.00. There is also owing interest in the sum of \$325.01 to December 31, 1948, and interest at 4% on the sum of \$9750.00 from January 1, 1949, until paid. Plaintiff asserts a legal and equitable lien, subject only to the prior lien of the United States of America, on the proceeds of the insurance above referred to by virtue of the following provision of the mortgage held by him:

“Mortgagors do further covenant and agree:

“(1) That they will procure and maintain, at their cost, hull insurance on the Aircraft

written under the standard "All Risks, Ground and Air" form, or under a "Named Perils, Ground and Air" form providing substantially the same coverage, with such companies, and in such amounts, as shall be satisfactory to the Mortgagee; that all such policies of insurance shall provide by appropriate endorsement that all proceeds and sums recoverable thereunder shall be paid exclusively to the Mortgagee for the account of all interests; that all proceeds paid or recovered under such policies of insurance shall at the option of the Mortgagee, be applied toward the payment of indebtedness (in which event any excess remaining after such payment shall be paid to the Mortgagors or whosoever may be entitled to receive same), or toward the repair or replacement of the Aircraft, and if such proceeds and sums are to be used for said repair or replacement, the Mortgagee shall make available for such purposes such portion of the proceeds received by the Mortgagee that is so required (any proceeds not so expended to be applied on the indebtedness); that all property acquired in replacement, as aforesaid, shall be subject to the obligations, covenants and conditions of this Mortgage; that the acceptance by the Mortgagee of a policy or policies of insurance containing provisions for amounts to be deductible from settlements of loss claims shall in no way limit the Mortgagors' liability under paragraph 3 below.'

The insurance referred to in paragraph III above is the only insurance which was procured by the Mortgagees covering the type of loss dealt with in the mortgage covenant referred to above.

VI.

On January 2, 1949, the aircraft above referred to crashed and burned in an attempted takeoff at Boeing Field, King County, Washington, resulting in the complete destruction of such aircraft and of all equipment and accessories attached thereto and forming a part thereof, except for salvage from all of the foregoing to the value of \$390.20. The actual agreed value of the aircraft, as provided in the certificate above mentioned, was \$25,000.00.

VII.

On January 5, 1949, which was as soon as practicable after the accident above mentioned, plaintiff R. P. Jandl through his attorneys gave written notice thereof to D. K. MacDonald & Company on behalf of the Estate of William F. Leland, who was killed in the accident above mentioned; a copy of such notice is attached hereto as Exhibit D and made by this reference a part hereof. Although plaintiffs made repeated demands on the defendants for payment of the sum due on the certificate, defendants have failed and refused to pay any part thereof other than the \$3,305.33 payment to the United States of America mentioned above. The sum now due, after deducting that \$3,305.33 payment, the salvage value of \$390.20, and the amount

of \$1,250.00 deductible under the certificate, is \$20,054.47, with interest thereon at the rate of 6% per annum from January 2, 1949.

Second Claim

Plaintiff R. P. Jandl, as Administrator of the Estate of William F. Leland, deceased, alleges:

I.

Realleges paragraphs I, II and III of the First Claim herein.

II.

The aircraft referred to in the First Claim herein crashed during the attempted takeoff referred to in Paragraph VI of that Claim into what is known as a revetment hangar at Boeing Field, owned by King County, Washington. On or about June 16, 1949, King County filed a creditor's claim in the Estate of William F. Leland, claiming damage to the hangar in the amount of \$2566.70. Plaintiff duly notified defendants of the filing of that claim and defendants refused to recognize it as a claim for which they were liable under the Certificate of insurance. Thereupon plaintiff disallowed the claim and King County commenced action to recover the amount of this damage in the Superior Court of the State of Washington for King County, in a cause entitled King County v. R. P. Jandl, as Administrator of the Estate of William F. Leland, deceased, Cause No. 413677. Plaintiff tendered defense of that action to defendants herein and the tender was refused. Thereupon, plaintiff

undertook defense of the action and so notified defendants herein and also notified them that their refusal to defend the action was considered a breach of the insurance contract above referred to and that they would be held liable for all damages resulting from that breach, including attorneys' fees and all other expenses of defending the action. The action was tried in due course and the court held King Coutny to be entitled to judgment against the Estate of William F. Leland, deceased, for damage caused to its revetment hangar in the amount of \$2,566.70 and costs of suit. In defending the action plaintiff incurred expense in the amount of \$34.90 for filing fees and witnesses and the further expense of employing attorneys to defend the action. A reasonable fee for the services performed by plaintiffs' attorneys in defending the action is \$1,000.

Defendants have denied liability for payment of any of the above amounts.

Wherefore, plaintiffs pray:

1. For judgment against the defendants and each of them on the First Claim herein in the sum of \$20,054.47, plus interest thereon at six per cent (6%) from January 2, 1949, until paid.

2. For judgment in favor of plaintiff R. P. Jandl, as Administrator of the Estate of William F. Leland, deceased, against the defendants and each of them on the Second Claim herein in the sum of \$3,601.60.

3. For their costs and disbursements herein and such other and further relief as to the court may seem proper.

/s/ J. CHARLES DENNIS,
United States District
Attorney.

HOUGHTON, CLUCK,
COUGHLIN & HENRY,
Attorneys for R. P. Jandl, as Administrator of the
Estate of William F. Leland, Deceased, and
C. W. Breakiron, as Successor Receiver for
Atlantic and Pacific Airlines.

EXHIBIT A

In Consideration of an Additional Premium of
\$35.00 Plus \$2.45 Taxes:

It is hereby agreed and understood that the following terms and conditions shall become a part of this certificate and/or policy.

Loss Payable:

Loss, if any under Section 1—"Loss or Damage to Aircraft" of this certificate and/or policy shall be payable to the Treasurer of the United States for the account of all interests.

Breach of Warranty:

In case of loss or damage on account of or during a breach of any warranties and/or conditions of this policy and/or security instruments with respect

to aircraft in the custody or possession of the purchaser, this policy shall, nevertheless, fully cover the United States of America, acting by and through the War Assets Administrator, against loss or damage covered by any of the perils insured against, but the liability of the insurer for any such loss shall not exceed the unamortized balance due on any chattel mortgage or on any note or security instrument, less unearned interest and unpaid installment due prior to the date of the loss or accident, if any, after the United States of America, acting by and through the War Assets Administrator, has exhausted all reasonable means to reduce such balance by attempting to collect amounts due from the purchaser and/or such other securities as they may have.

This policy shall cover aircraft located within the United States, but this policy shall not be vitiated or affected as far as the interest of the United States of America, acting by and through the War Assets Administrator, is concerned if without the consent of the United States of America, acting by and through the War Assets Administrator, such aircraft are taken out of the jurisdiction of the United States of America nor shall any act or omission to act by any parties insured hereunder other than the United States of America, acting by and through the War Assets Administrator, vitiate or in any manner affect the coverage hereunder of the United States of America, acting by and through the War Assets Administrator; nor shall the coverage be vitiated or af-

fectured as far as the United States of America, acting by and through the War Assets Administrator, is concerned by any statements or warranties of purchasers or any other parties not true to fact, provided that such misrepresentations are not known to the United States of America, acting by and through the War Assets Administrator prior to loss, if any.

Cancellation of Policy:

This policy shall be cancelled at any time at the request of the insured and/or the United States of America, acting by and through the War Assets Administrator, but only upon surrender of the original policy or a lost policy release or receipt executed by the Insurance Division, War Assets Administrator, in which case the company shall refund the excess of paid premium above the customary short rate premium for the expired term to the Treasurer of the United States, or his order, for the account of all interests. This policy may be cancelled at any time by the company by giving to the assured and the Insurance Division, War Assets Administration, Washington 25, D. C., thirty (30) days' written notice of cancellation with or without tender of the excess of paid premium above the pro rata premium for the expired term which excess, if not tendered shall be refunded on demand. Notice of Cancellation shall state that excess premium, if not tendered, will be refunded on demand. Notice of Cancellation mailed to the address of the

assured stated in the policy and the Insurance Division, War Assets Administration, Washington 25, D. C., shall be sufficient notice. The company shall not be liable for any return premium in respect to an aircraft on which a total loss has been paid.

All Other Terms and Conditions Remain Unchanged
Attached to and forming part of Certificate No.
W-OMA-253.

Issued to: W. F. Leland.

The Effective Date of This Endorsement Is: July
21, 1948.

SUBSCRIBING UNDERWRITING MEMBERS
OF LLOYD'S, LONDON, by

D. K. MacDONALD &
COMPANY,

By

Endorsement No. 6

Any Service of Suit clause contained in the policy and/or certificate to which this endorsement is attached is void and the following clause applies:

“Suit and Service of Process Clause
On Surplus Line Policies”

“As provided by Section .15.15 of the Insurance Code of the State of Washington, upon any cause of action arising out of this policy in the State of

Washington, action against the underwriters shall be brought, if at all, in the Superior Court of the county in which such cause of action arose. Service of legal process against the underwriters may be made in any such action by service upon the Insurance Commissioner, and the Insurance Commissioner shall mail process so served, or a true copy thereof, by prepaid registered mail with return receipt requested, to the following person, who is hereby designated by the underwriters as their representative for the purpose: Morrell P. Totten, 618 Second Avenue, Seattle, Washington. The Underwriters shall have forty (40) days from date of service upon the Commissioner within which to plead, answer, or otherwise defend the action.

“If any such action is brought against any one or more of the Underwriters named in this policy all Underwriters so named will abide by the final decision of such court or of any appellate court in the event of an appeal.”

This contract is registered and delivery by D. K. MacDonald & Company as a surplus line coverage under the insurance code of the State of Washington, enacted in nineteen hundred and forty-seven.

All Other Terms and Conditions Remain Unchanged
Attached to and forming part of Certificate No.
W-OMA-253.

Issued to: W. F. Leland.

The Effective Date of This Endorsement Is: July
21, 1948.

SUBSCRIBING UNDERWRITING MEMBERS
OF LLOYD'S, LONDON, by

D. K. MacDONALD &
COMPANY,

By,

Endorsement No. 5

Component Parts

1. Subject to all the provisions, conditions and limitations of the policy to which this endorsement is attached and of which it forms a part, it is hereby understood and agreed that the Company's liability for loss or damage to any of the component parts of the aircraft bearing Certificate Number shall not exceed the amount shown opposite each of the component parts listed below. The Assured agrees that each amount includes all costs of materials and parts required for replacement, possible transportation charges and all labor and other costs incidental to the repairs and replacement of the parts:

Propeller	5	% of insured value
Engine	20	% "
Fuselage	15	% "
Landing Gear (& Pontoons) .	15	% "
Center Section.....	7	% "
Left Wing.....	14	% "

Right Wing.....	14	% of insured value	
Ailerons @ ea., in all...	8	%	"
Fin	2.2	%	"
Rudder	2.2	%	"
Stabilizer	4.4	%	"
Elevators @ ea., in all..	2.2	%	"
All instruments.....	10	%	"
All Else.....	6	%	"

Notwithstanding the fact that the total of the amounts set forth above exceeds the declared value of the Aircraft as set forth in Column 8, page 1, of the Schedule of this Certificate and/or Policy, it is expressly understood and agreed that the Company's liability as respects the aforesaid aircraft shall be limited to the declared value of the Aircraft.

All Other Terms and Conditions Remain Unchanged
Attached to and forming part of Certificate No.
W-OMA-253.

Issued to: W. F. Leland.

The Effective Date of This Endorsement Is: July
21, 1948.

SUBSCRIBING UNDERWRITING MEMBERS
OF LLOYD'S, LONDON, by

D. K. MacDONALD &
COMPANY,

By,

Endorsement No. 4

Notwithstanding anything contained herein to the contrary, it is hereby declared and agreed that the coverage afforded by this policy does not apply whilst the insured aircraft is/are being used for crop dusting, seeding, spraying or hunting from the aircraft.

All Other Terms and Conditions Remain Unchanged Attached to and forming part of Certificate No. W-OMA-253.

Issued to: W. F. Leland.

The Effective Date of This Endorsement Is: July 21, 1948.

SUBSCRIBING UNDERWRITING MEMBERS
OF LLOYD'S, LONDON, by

D. K. MacDONALD &
COMPANY,

By

Endorsement No. 3

Anything to the contrary notwithstanding, it is hereby understood and agreed that:

(1) Ground and mooring risks as insured by "Section 1—Loss or Damage to Aircraft" of this Certificate and/or Policy shall cover taxiing (i.e., while the aircraft is moving under its own power or momentum but not included under the definition of flight risks.)

(2) Deductible under ground and mooring risks shall be as follows:

- | | | |
|-----|--|-----------|
| (A) | Taxiing (if included)..... | \$1250.00 |
| (B) | Windstorm or Hail on
Unhangared Aircraft..... | \$ 250.00 |
| (C) | Fire or Theft..... | Nil |
| (D) | All Else | \$ 250.00 |

All Other Terms and Conditions Remain Unchanged
Attached to and forming part of Certificate No.
W-OMA-253.

Issued to: W. F. Leland.

The Effective Date of This Endorsement Is: July
21, 1948.

SUBSCRIBING UNDERWRITING MEMBERS
OF LLOYD'S, LONDON, by

D. K. MacDONALD &
COMPANY,

By,

Endorsement No. 2

“In compliance with numbered line 7 of the schedule of this certificate and/or policy, it is hereby understood and agreed that the following are approved first pilots of the aircraft insured hereunder while holding valid pilot's airman certificates and proper ratings issued by the Civil Aeronautics Authority for the kind of flying performed and the aircraft type and horsepower:

Karl Christiansen
I. H. Mansfield
Joe M. Halsey
Merle F. Edgerton
Elmer Kangas
Donald Orcutt
James Cook
William H. Maxwell
Thomas M. Hoyt
Walter Keith
William B. Rutherford
Perry S. Cole
James S. Boyd
Ned B. Van Amburg
Herbert Strouss

It is further understood and agreed that any co-pilot is approved providing said co-pilot possesses a valid pilot's airman certificate and proper ratings issued by the Civil Aeronautics Authority for the kind of flying performed and the aircraft types and horsepower; and provided further that the approval granted herein is in effect only during such periods as an approved first pilot, possessing full Civil Aeronautics Administration Authority required qualifications is in charge of, and riding in, a pilot's seat of the aircraft.

All Other Terms and Conditions Remain Unchanged
Attached to and forming part of Certificate No.
W-OMA-253.

Issued to: W. F. Leland.

The Effective Date of This Endorsement Is: July
21, 1948.

SUBSCRIBING UNDERWRITING MEMBERS
OF LLOYD'S, LONDON, by

D. K. MacDONALD &
COMPANY,

By,

Endorsement No. 1

D. K. MACDONALD & COMPANY

SEATTLE 1, U.S.A.

has on the request of the Assured procured insurance as hereinafter specified from Liberty Fire

UNDERWRITERS AT LLOYD'S, LONDON

hereinafter called the Underwriters and in consideration of the sum of one hundred pounds (£100) the Underwriters do hereby agree to insure the Assured against the risks specified in the Schedule of Insurance subject to the terms, conditions and exclusions contained in the Schedule of Insurance and to indemnify the Assured subject to the terms, conditions and exclusions contained in the Schedule of Insurance and to indemnify the Assured subject to the terms, conditions and exclusions contained in the Schedule of Insurance.

SCHEDULE

1. Name of Assured, **M. F. LELAND**
2. Address of Assured, **80610 FIELD, SEATTLE, WASHINGTON**
3. Certificate Term From **JULY 21, 1948 - 12:01 AM** To **JULY 21, 1949 - 12:01 AM**
4. Assured's Business or Profession is **AIRCRAFT OPERATORS**
5. Assured's interest in the Aircraft is that of **OWNER**

6. Description of Aircraft, Value(s), Limit(s) of Liability, Premium(s)

AIRCRAFT DESCRIPTION MAKE AND MODEL Column 1	YEAR OF MFG Col. 2	TYPE Column 3	AIRCRAFT SERIAL NUMBER Column 4	Pass enger Test Col. 5	ENGINE(S) MAKE AND H P Column 7	AGREED VALUE Column 8
MC 17005	DOUGLAS DC 3	1942	LANDPLANE	28	2 JUL 1950	\$25,000

AIRCRAFT DESCRIPTION MAKE AND MODEL Column 1	SECTION 1 LOSS OR DAMAGE TO AIRCRAFT Description "Flight Risk" Column 10	SECTION 2 LIMITS OF LIABILITY COVERAGE A PROPERTY (Existing Passenger) Column 12	SECTION 3 LIMITS OF LIABILITY COVERAGE B PROPERTY (Existing Passenger) Column 13	SECTION 4 LIMITS OF LIABILITY COVERAGE C PASSENGER LIABILITY Column 15	PREMIUM CHARGE Column 17
MC 17005	\$1750.00	\$1750.00	\$1750.00	\$1750.00	\$2215.00
	\$175.00	\$175.00	\$175.00	\$175.00	\$2215.00
	\$175.00	\$175.00	\$175.00	\$175.00	\$2215.00

7. Policy AS APPROVED BY D. K. MACDONALD BY ENDORSEMENT HEREON.

8. Purpose for which the Aircraft will be used **PRIVATE BUSINESS AND PRIVATE PLEASURE FLIGHTS AND COMMERCIAL OPERATIONS INCLUDING PASSENGER AND FREIGHT FLIGHTS FOR HIRE OR RENTAL.**

9. Geographical Limits

UNITED STATES (EXCLUDING ALASKA) AND NOT EXCEEDING 100 MILES INTO MEXICO OR CANADA.

SECTION 1—LOSS OR DAMAGE TO AIRCRAFT

- [illegible]

SECTION 1-THIRD PARTY LIABILITY

- [illegible]

DECEMBER 1993

[illegible]

PROBATION DEPT. 1411000

- (a) The purchase of or policy from any other American source of liability writing from any American insurance company.
- (b) Any loan, advance or facility from any Government agency.
- (c) Any loan, advance or facility from any State or local government.
- (d) Any loan, advance or facility from any State or local government.
- (e) Any loan, advance or facility from any State or local government.
- (f) Any loan, advance or facility from any State or local government.
- (g) Any loan, advance or facility from any State or local government.
- (h) Any loan, advance or facility from any State or local government.
- (i) Any loan, advance or facility from any State or local government.
- (j) Any loan, advance or facility from any State or local government.
- (k) Any loan, advance or facility from any State or local government.
- (l) Any loan, advance or facility from any State or local government.
- (m) Any loan, advance or facility from any State or local government.
- (n) Any loan, advance or facility from any State or local government.
- (o) Any loan, advance or facility from any State or local government.
- (p) Any loan, advance or facility from any State or local government.
- (q) Any loan, advance or facility from any State or local government.
- (r) Any loan, advance or facility from any State or local government.
- (s) Any loan, advance or facility from any State or local government.
- (t) Any loan, advance or facility from any State or local government.
- (u) Any loan, advance or facility from any State or local government.
- (v) Any loan, advance or facility from any State or local government.
- (w) Any loan, advance or facility from any State or local government.
- (x) Any loan, advance or facility from any State or local government.
- (y) Any loan, advance or facility from any State or local government.
- (z) Any loan, advance or facility from any State or local government.

GENERAL CONDITIONS

1. A full assessment of each country's Army, Navy, Air Force and Coast Guard capabilities should be made by the Joint Assessment Agency, and the results of this assessment should be made available to the appropriate bodies of all the three Services.
2. The Joint Assessment Agency should be set up as a tripartite body, with representatives from each of the three Services, and should be empowered to call for information from any Ministry or Government Department, and to require the assistance of any Ministry or Government Department in the carrying out of its duties.
3. A full assessment of each country's Air Force, Navy, Air Force and Coast Guard capabilities should be made by the Joint Assessment Agency, and the results of this assessment should be made available to the appropriate bodies of all the three Services.
4. The Joint Assessment Agency should be set up as a tripartite body, with representatives from each of the three Services, and should be empowered to call for information from any Ministry or Government Department, and to require the assistance of any Ministry or Government Department in the carrying out of its duties.
5. The Joint Assessment Agency should be set up as a tripartite body, with representatives from each of the three Services, and should be empowered to call for information from any Ministry or Government Department, and to require the assistance of any Ministry or Government Department in the carrying out of its duties.
6. The Joint Assessment Agency should be set up as a tripartite body, with representatives from each of the three Services, and should be empowered to call for information from any Ministry or Government Department, and to require the assistance of any Ministry or Government Department in the carrying out of its duties.
7. The Joint Assessment Agency should be set up as a tripartite body, with representatives from each of the three Services, and should be empowered to call for information from any Ministry or Government Department, and to require the assistance of any Ministry or Government Department in the carrying out of its duties.
8. The Joint Assessment Agency should be set up as a tripartite body, with representatives from each of the three Services, and should be empowered to call for information from any Ministry or Government Department, and to require the assistance of any Ministry or Government Department in the carrying out of its duties.
9. The Joint Assessment Agency should be set up as a tripartite body, with representatives from each of the three Services, and should be empowered to call for information from any Ministry or Government Department, and to require the assistance of any Ministry or Government Department in the carrying out of its duties.
10. The Joint Assessment Agency should be set up as a tripartite body, with representatives from each of the three Services, and should be empowered to call for information from any Ministry or Government Department, and to require the assistance of any Ministry or Government Department in the carrying out of its duties.

EXHIBIT B

In the Superior Court of the State of Washington
for the County of King, in Probate

No. 109506

In the Matter of

THE ESTATE OF WILLIAM F. LELAND,

Deceased.

CREDITOR'S CLAIM

Claim is herewith presented against the estate of
said deceased as follows:

Estate of William F. Leland

To United States of America, acting by and through
the War Assets Administrator, Dr.:

This claim is founded upon a promissory note dated July 22, 1946, in the original principal amount of \$17,000, wherein Andrew J. Burke was maker and claimant herein was payee. Payment of said note was secured by a chattel mortgage covering one Douglas Aircraft, Model C-47A, Serial No. 10181. By agreement executed by William F. Leland, deceased, on or about July 15, 1948, the said Leland assumed and agreed to pay said note. Said aircraft was almost completely destroyed by fire on January 2, 1949, with the remaining salvage having heretofore been sold by the Administrator of the estate for a net of \$390.20 to which sum the lien of said mortgage attaches.

The unpaid principal balance of said note is \$5,211.57. Interest is owing thereon to January 2, 1949, in the amount of \$24.09. Additional interest accrues on said principal balance from January 2, 1949, at the rate of 4% per annum. The balance due and unpaid on this claim is the sum of \$5,235.66 together with interest on the principal balance of \$5,211.57 at the rate of 4% per annum from January 2, 1949, until paid.

This is a priority claim.

State of Washington,
County of King—ss.

O. C. Bradeen, being first duly sworn, says that he is duly authorized to make this claim on behalf of the claimant; that the amount of said claim, to wit, the sum of \$5,235.66, together with 4% interest on the sum of \$5,211.57 from January 2, 1949, until paid, is justly due said claimant, that no payments have been made thereon which are not credited and that there are no offsets to the same, to the knowledge of affiant.

/s/ O. C. BRADEEN,
Regional Director, Region 11, War Assets Administration, Seattle, Washington.

Subscribed and sworn to before me this 9th day of June, 1949.

N. N. VAUGHAN,
Notary Public in and for the State of Washington,
Residing at Seattle.

Receipt of the foregoing claim is hereby acknowledged this 13th day of June, 1949.

HOUGHTON, CLUCK,
COUGHLIN & HENRY,
Attorney for Administrator
of Above-Entitled Estate.

The foregoing claim is Allowed and approved for
\$.

.
Administrator.

The foregoing claim Allowed and Approved for
\$. this day of, 1949.

.
Judge.

EXHIBIT C

In the Superior Court of the State of Washington
for the County of King, in Probate
No. 109506

In the Matter of
THE ESTATE OF WILLIAM F. LELAND,
Deceased.

CREDITOR'S CLAIM

Claim is herewith presented against the estate of
said deceased as follows:

Estate of William F. Leland, Deceased

To Edward W. Watson, Receiver for Atlantic and Pacific Airlines, Dr., 2219 Mechanic Street, Galveston, Texas:

Date: Dec. 31, 1948.	Amount
Items: Balance due under note dated March 7, 1947, payable to Andrew J. Burke and by him assigned to "Edward W. Watson, Receiver for Atlantic & Pacific Airlines."	
Balance of principal due.....	\$9,750.00
Interest to 12/31/48	325.01

The above note was given for purchase of one Douglas DC-3 Aircraft, Serial No. 42-243-19 CAA No. NC-79025, and was secured by chattel mortgage on such aircraft, the original of which was duly recorded with Civil Aeronautics Administration on April 11, 1947, as Document #308271. The mortgage provided that said Aircraft be insured by mortgagor for mortgagee's benefit and this claim is entitled to legal and equitable lien (subject only to prior lien of WAA) on proceeds of insurance Pol. No. W-OMA-253 issued by McDonald & Company for Underwriters at Lloyds, London, which policy insured said Aircraft at time of its destruction. Lien is not waived.

State of Texas,
County of Galveston.

Edward W. Watson, being first duly sworn, says that he is duly authorized to make this claim on behalf of the claimant; that the amount of said claim, to wit: the sum of Ten Thousand Seventy-

five and 01/100 (\$10,075.01) Dollars, is justly due said claimant, that no payments have been made thereon which are not credited and that there are no offsets to the same, to the knowledge of affiant.

EDWARD W. WATSON.

Subscribed and sworn to before me this 9th day of May, 1949.

JANE CROWE,
Notary Public in and for
Galveston County, Texas.

Receipt of the foregoing claim is hereby acknowledged this 12th day of May, 1949.

.....,
Attorney for Administrator
of Above-Entitled Estate.

The foregoing claim is Allowed and approved for
\$.....

.....,
Executor....
Administrat....

The foregoing claim is Rejected this day of
....., 19....

.....,
Executor....
Administrat....

The foregoing claim Allowed and Approved for
\$..... this day of, 19....

.....,
Judge.

EXHIBIT D

January 5, 1949

D. K. McDonald and Company
Hoge Building
Seattle 4, Washington

Re: Policy No. W-OMA-253, Lloyds of London
issued to W. F. Leland, Seattle Air Charter.

Gentlemen:

In accordance with Section 4 of the General Conditions of the above policy we are writing this letter to notify you that the 1942 Douglas DC 3 Landplane, NC 79025 covered by the above policy was wrecked and burned at Boeing Field, Seattle, Sunday night, January 2, 1949.

You are, of course already familiar with this circumstance and we understand from conversations we have had with representatives of Morrell P. Totten & Company that the adjustment of claims has been placed in their hands and that the matter has been under investigation by them since very shortly after the disaster occurred. A representative of their office telephoned us regarding it on the morning of January 3rd and we have had other telephone conversations with representatives of their office since that date.

Twenty-seven passengers and three crew members were aboard the plane at the time it was wrecked. The three crew members and eleven of the passengers were killed and we understand that practically all of the remaining passengers sustained personal injuries.

We understand that the adjustors for the company have all available details regarding the injuries sustained. If any further information is needed, however, please advise us and we will cooperate to the fullest extent and furnish all information that is available to the representatives of the insured.

We are attorneys for the estate of William F. Leland, the insured, who was killed in the accident. Mr. R. P. Jandl has been appointed Administrator of Mr. Leland's estate.

It will be appreciated if you will let us know what proofs are necessary in connection with the insurance on the plane and furnish us necessary blanks for filing proof of claim.

Yours very truly,

R. V. HOUGHTON.

RVH:cs

Copy to: Morrell P. Totten & Co.

Culliton & McDonald, Inc.

[Endorsed]: Filed September 18, 1950.

In the District Court of the United States for
the Western District of Washington, Northern
Division

No. 2401

THE UNITED STATES OF AMERICA and
R. P. JANDL, as Administrator of the Estate
of William F. Leland, Deceased,
Plaintiffs,

vs.

EAGLE STAR INSURANCE COMPANY, LIM-
ITED; ORION INSURANCE COMPANY,
LIMITED; THE DRAKE INSURANCE
COMPANY, LIMITED, Subscribing Under-
writing Members of Lloyd's, London,
Defendants.

ORDER GRANTING LEAVE TO FILE
AMENDED COMPLAINT

Plaintiffs' motion for leave to file an amended complaint came on regularly for hearing on September 18, 1950, before the undersigned. Plaintiffs appeared by Rolla V. Houghton, one of their attorneys. Defendants appeared by Julian O. Matthews, one of their attorneys, and resisted the motion.

The court having examined the files of the case and having heard and considered the arguments of counsel, it is ordered that the motion is granted and the clerk of this court is directed to file the amended complaint which is attached to the motion on file herein. Pursuant to oral stipulation of the

parties in open court, it is ordered that the answer to the original complaint shall stand as an answer to the amended complaint; that all new matter in the amended complaint shall be deemed denied and that all affirmative defenses set out in the answer now on file shall apply to the allegations of the amended complaint.

Done in Open Court this 18th day of September, 1950.

/s/ PEIRSON M. HALL,
District Judge.

Presented by:

/s/ R. V. HOUGHTON,
Of Attorneys for Plaintiffs.

Approved as to form:

/s/ JULIAN O. MATTHEWS,
Of Attorneys for Defendants.

[Endorsed]: Filed September 18, 1950.

[Title of District Court and Cause.]

PLAINTIFFS' ANSWER TO DEFENDANTS'
REQUEST FOR ADMISSION UNDER
RULE 36

Plaintiffs make the following answer to defendants' Request for Admission Under Rule 36:

Sections a, b, c, d and e: Plaintiffs admit the truth of the statements contained in the sections of the request designated a, b, c, d and e.

Section f: Plaintiffs cannot truthfully admit or deny the statements contained in Section f of the request for the reason that Sec. 42.36 of Title 14, 1949 Edition of Code of Federal Regulations, does not define "instrument flight operations" and for the further reason that the pilot, the co-pilot and the owner of the plane, who were the only persons who ever knew whether the plane was engaged in instrument flight operations, were killed in the attempted takeoff.

Section g: Plaintiffs admit that a flight plan, as described in Section g was filed as therein alleged. Plaintiffs cannot truthfully admit or deny that the statements of intention therein contained were true statements of intention as to said flight or that the statements of fact therein contained were true statements of fact pertaining to the attempted take-off and flight described in the complaint herein, for the reason that the owner, the pilot and the co-pilot of the plane, who were the only persons who knew whether the statements of fact and of intention were true were killed in the attempted takeoff.

Section h: Plaintiffs cannot truthfully admit or deny the statement contained in this section for the reason that the records of the U.S. Weather Bureau do not show whether, at the time of the attempted takeoff, it reported the visibility at Boeing Field. Plaintiffs admit that the records of the U.S. Weather Bureau show that the visibility from the tower at Boeing Field at the time of the attempted takeoff was one-fourth mile.

Section i: Plaintiffs cannot truthfully admit or

deny the statement contained in Section i, for the reason that they have no personal knowledge regarding the matter, and that the pilot to whom the words were spoken, if spoken at all, is dead, and the truth of the statement can only be determined by evaluating the testimony of such witness or witnesses, if any, as may be able to testify on the subject.

Section j: Plaintiffs cannot truthfully admit or absolutely deny the statements contained in this section. They do deny, on information and belief, each and every statement therein contained. The sources of their information and belief are as follows: The Civil Aeronautics Administration has, in its office in the Exchange Building, Seattle, a file containing photostatic copies of some but not all of the exhibits used at an investigation of the accident in which aircraft NC79025 was destroyed, which investigation was conducted by the Civil Aeronautics Board at Seattle on or about January 18, 1949. Among those photostatic copies are two of what are called "Propeller Logs." These pertain to propellers which were installed on airplane No. NC79025 on March 28, 1948, and contain entries pertaining thereto. The propellers referred to in these logs are of the same make and have the same type hubs as the propellers that were on the plane at the time of the crash, but their serial numbers do not appear in the logs and it is therefore impossible to identify them definitely by the logs as being the same propellers. Plaintiff R. P. Jandl, Administrator, was decedent Leland's audi-

tor continuously from prior to March 28, 1948, to the date of his death and was generally familiar with the details of his business. To the best of his knowledge and recollection, the propellers referred to in the log as having been installed on March 28, 1948, are the same ones that were on the plane at the time of the attempted takeoff described in the complaint. The mechanic who had charge of the maintenance of the plane continuously from prior to March 28, 1948, until its destruction on January 2, 1949, says that his recollection is the same. While the above-mentioned file in the office of the Civil Aeronautics Administration does not contain any original documents or any copies of logs in a form that would ordinarily be referred to as "books," it does contain, in addition to the two propeller logs above mentioned, a photostatic copy of an inspection report dated December 22, 1948, pertaining to aircraft NC79025. Plaintiffs believe and assert that this is actually and legally a part of the log of the plane. It contains references to the propellers that were on the plane at the time of the attempted takeoff described in plaintiffs' complaint and shows, as to each propeller, the make, the number of hours since overhaul, number of hours since last 100-hour inspection and number of hours since last 400-hour inspection.

The reasons plaintiffs cannot absolutely deny the statements contained in Section j are that the plane and nearly all papers aboard it were destroyed by fire on January 2, 1949, at the time Leland, who

personally attended to most of the business connected with the keeping of its logs and records, was killed. On January 3 and 4, 1949, the plaintiff Administrator delivered to a representative of the Civil Aeronautics Administration all available records pertaining to Aircraft NC79025 for the period 1947 and 1948, including all logs, log books and maintenance and operations records that could be found. These were not examined by any of the plaintiffs and none of the plaintiffs have any personal knowledge regarding their contents. They were never returned. After plaintiffs were served with defendants' request for admission under Rule 36 they inquired of the Seattle representatives of the Civil Aeronautics Administration and learned that, as far as can be determined from local sources, all of these documents were sent to Washington, D. C., and deposited there in the record section of the Civil Aeronautics Administration. Plaintiffs can ascertain the contents of these documents, if at all, only by doing the work and incurring the expense involved in trying to get certified copies. Even if they did that, plaintiffs still could not admit or deny with certainty the statements contained in Section j of defendants' request, because the current logs probably were aboard the plane and destroyed in the fire, or may have been lost or misplaced after leaving the plaintiff Administrator's possession.

Section k: Plaintiffs cannot truthfully admit or absolutely deny the statements contained in this section. They do deny, on information and belief,

each and every statement therein contained. The source of their information is the statement of the mechanic who had charge of the maintenance of the plane that engine log books were kept which were substantially current and the general recollection of the plaintiff administrator to the same effect, although neither the administrator nor the mechanic can recall specific dates or entries in the engine log books. The reason no engine log book is available for inspection is the same as that stated in plaintiffs' answer to Section j with regard to propeller log books. There are no copies of engine log books in the file at the office of the Civil Aeronautics Administration referred to in the answer to Section j. The inspection report of December 22, 1948, referred to above in the answer to Section j, and which plaintiffs believe is a part of the log of the plane, contains entries pertaining to the engines which were installed on the plane at the time of the attempted takeoff described in the complaint.

Section 1: Plaintiffs do not know what defendants mean by the words "aircraft log for airplane No. NC79025." If they mean a single book in which all notations pertaining to the airplane were to be made, then plaintiffs cannot truthfully admit or deny the statements contained in Section 1 of defendants' request. The reason for this is that if such a book exists plaintiffs have no knowledge of it or its contents. What is said in the answer to Section j with reference to the disposition and possible destruction of logs and records pertaining to this aircraft applies to the airplane log book, if

there was one. If such a book is in existence then to the best of plaintiffs' knowledge and belief neither the original nor a copy thereof is available for inspection at any point closer than Washington, D. C. There is no such copy in the above-mentioned file at the Seattle office of the Civil Aeronautics Administration, and plaintiffs, after diligent inquiry, have been unable to locate a copy.

Plaintiffs believe that the log for airplane No. NC79025 consisted not of a single book but of separate sheets containing Pilot flight reports, maintenance transcripts, inspection reports and log of pilots' contacts. If this is the meaning of "aircraft log for airplane No. NC79025," plaintiffs deny each and every statement contained in Section 1 of defendants' request. In the above-mentioned file at the Seattle office of the Civil Aeronautics Administration there are photostatic copies of the following documents pertaining to aircraft NC79025: Log of Pilots Contacts for the period December 31, 1948, to January 2, 1949; Inspection reports dated December 22, 1948, and January 2, 1949; and Pilots flight reports and maintenance transcripts dated December 6, 12th, 13th and 14th, 1948.

Section m: Plaintiffs admit that only two pilots permitted to fly airplane No. NC79025 under the provisions of the insurance policy described in the complaint were on board at the time of the attempted takeoff described in the complaint. They deny that said pilots were scheduled to fly said airplane for more than 8 hours without a rest period

during the 24 hours after the takeoff described in the complaint.

Section n: Plaintiffs deny that on January 2, 1949, at the time of the attempted takeoff described in the complaint, William F. Leland personally was operating airplane No. NC79025. They admit that at that time the airplane was being operated for William F. Leland, by his employee, under operating certificate No. 7-73, which was issued by the Department of Commerce, Civil Aeronautics Administration, to William F. Leland and authorized him to conduct non-scheduled air carrier operations in multi-engine land airplanes.

Section o: Plaintiffs admit that at the time of the attempted takeoff described in the complaint the decedent Leland had not modified said airplane to meet all fireproofing standards established by regulation of the Civil Aeronautics Administration. He had completed much of that work but not all of it. Plaintiffs deny defendants' legal conclusion "that said regulations required the fireproofing standards to be complied with by November 1, 1948, unless a waiver as to compliance was obtained by said date."

The regulations referred to are 14 C.F.R., Section 42.10, which established certain fire prevention standards for certain non-scheduled aircraft in passenger service and required compliance on or before November 1, 1948, and Special Regulation, Serial No. SR-329, effective November 1, 1948, 13 F.R. 6537, which, so far as applicable to aircraft No. NC79025, reads:

“Notwithstanding the provisions of Sections * * * 42.10 * * * of this subchapter establishing certain fire prevention standards requiring compliance on or before November 1, 1948, no air carrier shall be held in violation of these requirements prior to December 1, 1948. Upon application by the air carrier prior to December 1, 1948, the Administrator may further authorize an air carrier to operate without full compliance with these requirements where the Administrator finds that the air carrier has made a diligent effort to meet these requirements by November 1, 1948, and that the air carrier has shown that it will comply with these requirements by a date certain; Provided, that no air carrier shall be required to install or maintain smoke or fire detectors, other than heat detectors, unless otherwise directed by the Administrator.”

Section p: Plaintiffs deny each and every statement contained in this section. They admit that in accordance with Special Regulation No. SR-329, referred to above in the answer to Section o, the decedent applied to the Administrator of the Civil Aeronautics Administration for an extension of the time for complying with the fire prevention requirements above mentioned and that such extension was granted for a period of 60 days effective December 1, 1948, and was in force and effect on January 2, 1949.

Section q: Plaintiffs deny defendants' legal con-

clusion that a waiver was in force or effect. They cannot truthfully admit or deny that neither the decedent Leland nor anyone in his behalf applied to D. K. McDonald & Company or received from D. K. McDonald & Company consent to operate airplane No. NC79025 while the time extension referred to in the preceding paragraph of this answer was in force and effect. The reasons plaintiffs cannot truthfully admit or deny this are that they have no personal knowledge or information regarding the matter and have found no record pertaining to it and that the application, if one was made, was probably made personally by the decedent.

/s/ J. CHARLES DENNIS,
United States District
Attorney.

HOUGHTON, CLUCK,
COUGHLIN & HENRY,
Attorneys for Plaintiffs R. P. Jandl, Administrator
of the Estate of William F. Leland, Deceased,
and C. W. Breakiron, Successor Receiver for
Atlantic and Pacific Airlines.

United States of America,
State of Washington, County of King—ss.

R. P. Jandl, Administrator of the Estate of William F. Leland, deceased, being sworn, says: I am one of the plaintiffs above named; I have read the foregoing Answer to Defendants' Request for Ad-

mission Under Rule 36, know the contents thereof and state the same to be true.

/s/ R. P. JANDL.

Subscribed and sworn to before me this 18th day of September, 1950.

[Seal] /s/ ROLLA V. HOUGHTON,
Notary Public in and for the State of Washington,
Residing at Seattle.

Receipt of Copy acknowledged.

[Endorsed]: Filed September 18, 1950.

[Title of District Court and Cause.]

STIPULATION

In order to facilitate the preparation of evidence for use in the trial of this case, the parties thereto, through their respective attorneys, stipulate and agree as follows:

1. Copies of any records of the United States Civil Aeronautics Board or Civil Aeronautics Administration, or of any papers, plats, photographs, documents or exhibits in the possession of either of those agencies, certified by the person having custody or possession thereof to be true copies of what they purport to be, shall be admissible in evidence in this cause to the same extent as, but no greater extent than, if the originals were identified or the copies offered in evidence were certified

and authenticated in all respects as required by any applicable statute or rule of court.

2. Copies of any records of Yale University or any of its departments, certified to be true copies of such records by any person who certifies that he has custody or possession thereof, shall be admissible in evidence in this cause to the same extent as, but no greater extent than, the original records would be if the official custodian thereof produced them in open court and testified to their genuineness.

3. Counsel for plaintiffs have exhibited to counsel for defendants a photostatic copy of a promissory note for \$18,361.15, dated March 7th, 1947, signed by Robert E. Stone and William L. Leland, payable to Andrew J. Burke, or his order, and assigned by Andrew J. Burke to Edward W. Watson, as Receiver for the Atlantic and Pacific Air Lines, or his successors in office, and a typewritten copy of a mortgage on the face of which is written with pen and ink:

“Copy.

“Mortgage recorded by CAA on April 11, 1947, as Document No. 308271.”

It is agreed that these are true copies of the note and mortgage referred to in Paragraph V of plaintiffs' amended complaint, first claim, and that said copies shall be deemed admissible in evidence herein to the same extent as, but no greater extent than, the originals would be if properly identified and

offered in evidence. Any rights of said receiver under said policy are no greater than the right of the named assured W. F. Leland.

4. Counsel for plaintiffs have exhibited to counsel for defendants certified copies of two orders in Cause No. 68,884 in the District Court, Galveston County, Texas, 10th Judicial District, entitled "Andrew J. Burke vs. Lester Lamb." One of these orders is dated September 7, 1949, and the other is dated December 5, 1949. It is agreed that these are true copies, that any lack of formality in certifying or authenticating them is waived, and that they may be admitted in evidence herein to the same extent and effect as though certified and authenticated in accordance with all statutes and rules of procedure applicable to the admission of such copies as evidence in this court.

5. If either party desires to introduce in evidence at the trial of this cause any part of the records of the Superior Court of the State of Washington for King County in Probate Proceeding No. 109506 entitled: "In the Matter of the Estate of William F. Leland," or in Cause No. 413677 entitled: "King County, a Municipal Corporation of the State of Washington, Plaintiff, vs. R. P. Jandl, as Administrator of the Estate of William F. Leland, Deceased, Defendant," it shall not be necessary for him to procure certified or authenticated copies but he may submit uncertified copies which his counsel declares in open court to be true copies and shall make the original files

available for comparison by counsel for the other side, and if the latter finds them to be true copies he will stipulate in open court that they may be admitted in evidence herein to the same extent as, but no greater extent than, like copies could be if certified and authenticated in accordance with all statutes or rules of procedure applicable to the admission of such copies as evidence in this court.

6. Exhibit A, attached to plaintiffs' amended complaint, is a true copy of Certificate No. W-OMA-253, issued to William F. Leland through the office of D. K. MacDonald & Company, at Seattle, Washington, including endorsements numbered 1 to 6 attached thereto. At the time of the accident referred to in the amended complaint all premiums on said certificate were fully paid.

7. It is stipulated that Exhibits E, F and G, attached hereto, are copies of letters written by plaintiff Jandl's attorneys, Houghton, Chuck, Coughlin & Henry, to defendants' agent D. K. MacDonald & Company regarding the claim and suit of King County, Washington, mentioned in plaintiffs' amended complaint, second claim, paragraph II, and that such copies shall be admissible in evidence to the same extent as, but no greater extent than, the original letters would be if identified and offered in evidence.

8. It is stipulated that defendants rejected the tendered defense of the suit by King County, mentioned in plaintiffs' amended complaint, second claim, paragraph II.

9. Defendants expressly deny that plaintiff Jandl is entitled to recover anything for the services of attorneys employed by him in defending the suit of King County, Washington, mentioned in plaintiffs' amended complaint, second claim, paragraph II. The parties agree, however, that the reasonable value of the services rendered by the attorneys employed by the plaintiff administrator in defending that action was \$500.00, which shall be the amount allowed if the court finds that the administrator is entitled to recover therefor.

10. It is stipulated that Exhibit H attached hereto is a true copy of a letter written by the attorneys for the plaintiff administrator to Merrill P. Totten & Company, Insurance adjusters designated by defendants to represent them in the handling of claims under the policy sued on in this action, and that the same shall be admissible in evidence to the same extent as, but no greater extent than, the original letter would be if identified and offered in evidence.

11. It is stipulated that Exhibit B attached to the amended complaint is a true copy of the creditor's claim that was filed in the Superior Court of the State of Washington for King County by plaintiff United States of America, on June 9, 1949.

12. It is stipulated that Exhibit C attached to the amended complaint is a true copy of a creditor's claim that was filed in the Superior Court of the State of Washington for King County on May 12, 1949.

13. It is stipulated that the plaintiff administrator was authorized to bring this action by an order entered by the Superior Court of the State of Washington for King County in its Probate Proceeding No. 109506 on September 28, 1949.

14. It is agreed that the crash and burning referred to in Paragraph VI of the amended complaint, first claim, resulted in complete destruction of the aircraft except for salvage of the value of \$390.20.

Dated October 6, 1950.

/s/ J. CHARLES DENNIS,
United States District
Attorney.

HOUGHTON, CLUCK,
COUGHLIN & HENRY,

By /s/ R. V. HOUGHTON,
Attorneys for R. P. Jandl, as Administrator of the
Estate of William F. Leland, Deceased, and
C. W. Breakiron, as Successor Receiver for
Atlantic and Pacific Airlines.

MacBRIDE, MATTHEWS &
HANIFY,

By /s/ JULIAN O. MATTHEWS,
Attorneys for Defendants.

EXHIBIT E

July 8, 1949

D. K. MacDonald & Company
Exchange Building
Seattle, Washington

Re: Estate of William F. Leland and
Lloyd's of London Policy No. W-OMA-253

Gentlemen:

We are writing to advise you that King County Airport has filed a creditor's claim against the above estate for \$2,684.70.

The basis of \$2,566.70 of this claim is damages alleged to have been done to the revetment hanger of the claimant when the insured plane crashed on January 2, 1949.

We believe this damage is covered by Section 2, Coverage B, of the above policy (Third Party Liability—Property Damage).

We are giving you this notice pursuant to Section 4 of the general conditions of the policy.

Since it is our position that any claim established for this damage will be the obligation of the insurer, we hereby tender the defense of this claim to you and request that you advise us as to any steps you wish the administrator to take regarding it.

Yours very truly,

R. V. HOUGHTON.

RVH:MS

EXHIBIT F

November 4, 1949

D. K. MacDonald & Company
Exchange Building
Seattle 4, Washington

Re: Estate of William F. Leland, Deceased.

Lloyd's of London Policy No. W-OMA-253.

Gentlemen:

On July 8, 1949, we advised you that King County Airport had filed a creditor's claim against the above estate for \$2,684.70, of which \$2,566.70 was a claim for damages alleged to have been done to the revetment hangar of the claimant when the insured plane crashed on January 2, 1949.

You acknowledged that letter on July 11th, advising us that the handling of claims under the policy was being accomplished through Morrell P. Totten & Company and that you were forwarding our letter of July 8th to them for necessary action.

We have heard nothing further from anyone representing the insurance company with regard to this claim.

On September 28th the Administrator endorsed his rejection on the claim, the rejecting the \$2,566.70 thereof representing alleged property damage. Notice of such rejection was given to the county by registered mail as required by state.

On or about October 26th Mr. Jandl, the Administrator, was served with a Summons and Complaint based on the filed and rejected claim. This case is

pending in the Superior Court of the State of Washington for King County and is entitled, King County, a Municipal Corporation of the State of Washington, Plaintiff, vs. R. P. Jandl, as Administrator of the Estate of William F. Leland, Deceased, Defendant.

We are enclosing three copies of this Summons and Complaint.

As we advised you in our letter of July 8th, it is the position of the Administrator that this claim is a responsibility of the insurer under Section 2, coverage b, of the above policy. The defense of the case is hereby tendered to the insurer.

If the insurance company does not assume the defense of the case within the time allowed by the Summons for answering, we will enter an Appearance in the case on behalf of the Administrator in order to prevent the entry of an Order of Default against him. The Administrator will expect the underwriters to pay all expenses incurred by him in defending this suit if the underwriters do not defend it.

We will appreciate being advised promptly of the attitude of the underwriters with regard to defending the claim.

Yours very truly,

R. V. HOUGHTON.

RVH:cs

Enclosures

EXHIBIT G

February 1, 1950

D. K. MacDonald & Company
Exchange Building
Seattle 4, Washington

Re: Estate of William F. Leland, Deceased.
Lloyd's of London Policy No. W-OMA-253.

Gentlemen:

On November 4, 1949, we wrote you regarding a suit that has been commenced against R. P. Jandl, Administrator of the above estate, by King County, a municipal corporation of the State of Washington, for alleged damages to the revetment hangar at Boeing Field when the insured plane crashed on January 2, 1949.

On November 16th we wrote Mr. Julian O. Matthews, attorney for the underwriters, advising him that we had served a notice of appearance in the case, but were doing so without prejudice to our right to insist that the underwriters defend the case.

On January 24, 1950, the attorney for the plaintiff wrote us requesting that the answer of the defendant be served and filed so that the case may be noted for trial. We communicated this information to Mr. Matthews and he has indicated that the underwriters do not care to defend the case.

In order that judgment may not be taken by default we are filing an answer and are forwarding a copy thereof to Mr. Matthews with a copy of this letter.

The policy provides that the underwriters will defend, until they elect to pay their limit of liability, in the name of and on behalf of the insured, any claim or suit, whether groundless or not, brought against the insured and in respect of which the insured is entitled to indemnity under the policy.

As we advised you in our letter of November 4th, the Administrator takes the position that this claim is the responsibility of the underwriters under Section 2, coverage b, of the policy, and that it is the duty of the underwriters to defend the claim or settle it. Since they have not elected to do this, the Administrator has employed us to defend the case.

The Administrator considers the failure of the underwriters to defend the case as a breach of the insurance contract and has instructed us to advise you that he expects to hold them liable for all damages resulting from this breach, including attorneys' fees and other expense reasonably and necessarily incurred in defending this action.

Yours very truly,

R. V. HOUGHTON.

RVH:cs

EXHIBIT H

May 13, 1949

Morrell P. Totten & Company
15th Floor, 821 Second Ave. Bldg.
Seattle 4, Washington

Re: Lloyd's Certificate W-OMA-253 on Douglas
DC-3 NC 79025, Estate of William F. Leland.

Gentlemen:

It has been more than four months since the above plane was destroyed and we have had no indication as to when, if ever, settlement can be expected on the above policy.

We feel that the matter has been allowed to run long enough and are writing to advise you that unless your company either pays the policy or gives definite indication of its intention to pay it by May 19, 1949, we expect to apply to the Probate Department of the Superior Court of King County for authority to sue on the certificate.

Yours very truly,

R. V. HOUGHTON.

RVH:cs

[Endorsed]: Filed October 10, 1950.

[Title of District Court and Cause.]

STIPULATION

It Is Stipulated that the names of all passengers who were aboard aircraft No. NC79025 at the time it crashed and burned in its attempted take-off and flight at Boeing Field on January 2, 1949, are as follows:

Adams, Robert R.
Belknap, Charles S.
Brown, Noel L.
Campbell, Donald M.
Franzheim, Harry C., III
Haerle, David B.
Howe, William H.
Knoll, Joseph G.
Liddle, Jack W.
Nilsen, Orville N.
Reese, Asbjorn G.
Schaak, John C.
Thompson, Theodorus A. A.
Young, Roger W.
Anderson, Thomas H.
Bjork, Richard E.
Bryan, James L.
Cole, George M.
Garrett, Don L.
Hartley, Wallace
Kendall, John W., Jr.
Laird, Ralph D.
Lynch, Donald F.

Palmer, Russell H.
Roderick, John R.
Smith, James W.
Wickman, Leonard B.

Dated this 11th day of October, 1950.

/s/ J. CHARLES DENNIS,
U. S. Attorney.

HOUGHTON, CLUCK,
COUGHLIN & HENRY,
Attorneys for R. P. Jandl, as Administrator of the
Estate of William F. Leland, Deceased, and
C. W. Breakiron, as Successor Receiver for
Atlantic and Pacific Airlines.

/s/ JULIAN O. MATTHEWS,
Attorneys for Defendants.

[Endorsed]: Filed October 11, 1950.

[Title of District Court and Cause.]

COURT'S OPINION

On January 2, 1949, there was in effect a Lloyd's policy of insurance, Certificate No. W-OMA-253, on Douglas DC-3 airplane #NC 79025, insuring one Leland, the owner, as the assured, under said policy against accident, loss, damage and/or liability in respect to said aircraft, subject, however, to the terms, conditions and limitations contained in the policy.

On said January 2, 1949, the aircraft was wrecked and except as to small salvage was totally destroyed, and the assured Leland was killed, in an attempted flight take-off at Boeing Field, Seattle.

In this case, all of the above-named plaintiffs have joined in one complaint their several claims under the policy against the defendant insurers.

Plaintiff Jandl as administrator of the assured Leland's estate brings the principal one of such joined actions on the policy to recover the aircraft's full insured value (less realized salvage and a mortgage policy benefit already paid to plaintiff United States) in the net sum of \$20,054.47 and interest.

The plaintiffs United States and C. W. Breakiron in their said joined claims assert (1), independently of the policy provisions, certain mortgage and creditor rights against the Leland estate and further assert (2), as against any such policy net proceeds as may be recoverable on behalf of assured Leland or his estate, certain policy proceeds mortgage rights which, according to the opening statement stipulation of counsel for all plaintiffs and defendants, are no greater and no less than the assured's rights under the policy, because such policy proceeds mortgage rights derive only from the assured's policy rights, and said mortgage rights are the only policy rights claimed by plaintiffs United States and C. W. Breakiron.

From a preponderance of the evidence the Court is of the opinion and decides:

Paragraph 3 of the General Conditions of the policy provided:

“The assured shall use due diligence and do and concur in doing all things reasonably practicable to avoid or diminish any loss of or damage to the property hereby insured and in the event of the aircraft sustaining damage covered by this certificate and/or policy, the assured or his/their accredited agents shall forthwith take such steps as may be necessary to insure the safety of the damaged aircraft and its equipment and accessories.”

That W. F. Leland, the assured, the owner of the insured aircraft, personally failed to use due diligence, and failed to do and failed to concur in doing all things reasonably practicable, to avoid or diminish the loss of or damage to the insured aircraft on January 2, 1949, when said aircraft was wrecked in an attempted take-off from Boeing Field, Seattle, in that said assured Leland negligently, carelessly and recklessly caused the acting pilot of the insured aircraft to attempt to take off in flight in dangerous weather conditions and when said insured aircraft had ice and snow on its surfaces and had icicles hanging to its under surfaces, all of which conditions made it extremely unsafe to fly said aircraft and of all said conditions said assured owner personally was forewarned and had personal knowledge.

That such attempted take-off in flight so caused by said assured owner resulted in wrecking and

destroying said insured aircraft and in the death and injury of a number of persons then on said aircraft, all of which results were proximately caused by such failure to use due diligence and by such failure to do and to concur in doing all things reasonably practicable to avoid or diminish the loss of or damage to the insured aircraft in violation by said assured owner of the express terms and conditions of the insurance contract.

That plaintiffs are not entitled to recover any relief prayed for in their amended complaint and plaintiffs' actions herein should be dismissed with prejudice.

The foregoing is not to be regarded as the judgment or order of the Court, but it is directed that, pursuant to the foregoing, counsel for defendants prepare and serve on opposing counsel forms of findings of fact, conclusions of law and judgment, and present such forms to this Court for settling and entering on July 23, 1951, at 2 o'clock p.m., when counsel on all sides will be heard in respect thereto, and the clerk is directed to withhold the entry of the Court's judgment herein until further order.

/s/ JOHN C. BOWEN,

United States District Judge.

[Endorsed]: Filed July 13, 1951.

REPORTER'S TRANSCRIPT OF EXCERPT
FROM RECORD RE ALLEGATIONS OF
PARAGRAPH IV, OCT. 10, 1950

Mr. Houghton: The next paragraph, paragraph 4, makes allegations with regard to this claim of the Government, and that the insured paid a certain portion of it. The defendants admit that down to the part which refers to the unpaid balance due the Government, and the defendants state that as to that they have no knowledge. Is that correct?

Mr. Matthews: Our position in connection with that matter is this, Mr. Houghton, and I believe we are in agreement upon it: that under the mortgagee endorsement we have paid to the Government all sums which the Government would be entitled to irrespective of policy violations, and that the Government's claim as to any balance which may be due is no greater than the rights of Mr. Leland, since we have paid everything that would be due under the mortgagee endorsement which would protect the Government in the event there were violations.

Mr. Houghton: I think that is true. I think that particular stipulation about the rights of the mortgagee not rising above those of the mortgagor was made with regard to the second mortgage and not the Government's mortgage, and, of course, the Government would be the one that would have to say whether its mortgage rises higher or not. However, it would be my opinion at this time that it does not.

Mr. Matthews: Our allegations in our answer are sufficient to set forth our position.

Mr. Houghton: Yes, I think so.

Mr. Dennis: You don't deny that this amount is due on the note?

Mr. Matthews: We don't know as to that, but we are advised and we understand the facts to be that the underwriters of Lloyds and the other defendants paid to the United States Government the unamortized balance due on its claim. That is everything that the United States, acting through the War Assets Administration, claimed that was owed in any event, irrespective of violations of the policy by the assured, and this balance which is due would only be the sums which the Government would be entitled to receive in the event it was established that there were no policy violations.

Mr. Houghton: I think that is true. We have checked it and it is our opinion that the insurers paid the Government the amount that was due under that endorsement on the policy, and it would be our opinion, the same as Mr. Matthews', that the Government has the same rights now as the Leland estate so far as the balance owing.

Mr. Matthews: And no greater rights.

Mr. Houghton: I don't think that the amount that is owing on this mortgage under those circumstances really makes any difference to the defendants, because whatever goes to the Government, if any, comes out of any recovery to Leland. I was wondering if counsel for defendants would be willing to stipulate that the rest of that paragraph is

true, that is, that the amount still owing to the Government by Leland is as alleged in the amended complaint. If not, we have the administrator here and are prepared to prove it, and he can tell counsel that those statements are true, that that is the unamortized balance of the Government's claim.

Mr. Matthews: Yes, Mr. Houghton, to expedite the trial we are willing to stipulate that the amount set forth is the correct balance, provided it is understood that the Government stands in exactly the same position as the assured stands as far as recovery in respect to policy violations.

Mr. Houghton: We are willing to stipulate to that. I think the Government is.

Mr. Dennis: That is correct.

Mr. Houghton: That means that the whole of paragraph IV is admitted.

The Court: Is that the attitude of all litigants, the last statement?

Mr. Dennis: Yes, your Honor.

Mr. Houghton: Yes, your Honor. There are only three sets of counsel actually represented.

The Court: I understand it to be now the admission of all litigants in this case that the allegations of paragraph IV are true?

Mr. Matthews: Except with the question of interest, your Honor. It is our position that this being an unliquidated claim, the interest would not begin to run until the judgment is entered, but as to the principal balance, which I understood counsel was talking about, that, we believe, is correct and are willing to so stipulate.

Mr. Houghton: And simply leave the question of interest to be decided as a question of law by the Court.

The Court: Is this another way of stating what counsel have just said about paragraph IV: all allegations in paragraph IV admitted except as to when interest begins to run, plaintiffs contending that the time of the beginning of the running of interest is as alleged in that paragraph, and defendants contending that such interest does not begin to run until this Court's judgment, if any, against defendant is entered.

Mr. Matthews: That is agreeable.

Mr. Houghton: Yes, your Honor. Paragraph V alleges that——

[Endorsed]: Filed July 18, 1951.

[Title of District Court and Cause.]

CLERK'S RECORD OF TRIAL

Now on this 10th day of October, 1950, J. Charles Dennis, U. S. Attorney, appears for the Government. Rolla V. Houghton and Jack R. Cluck, of Houghton, Cluck, Coughlin & Henry, appears for the Plaintiff, R. P. Jandl, as Admr. of the Estate of William F. Leland, deceased. Julian O. Matthews, of Macbride, Matthews and Hanify, appears for the Defendant, Eagle Star Insurance Co., Ltd. Ward L. Sax also appears for the Defendant.

This cause is called for trial. All of the parties

are present through their counsel. Both sides announce they are ready. Rolla V. Houghton and Jack R. Cluck make their opening statements to the Court on behalf of the plaintiffs; Mr. Julian O. Matthews and Beverley S. Wilkerson make their opening statements to the Court on behalf of the defendants.

Stipulation between the parties is filed. The Plaintiffs' Exhibits Nos. 1, 2, 3, 5 and 7 are admitted; 4 and 6 are marked. The Defendant's Exhibits Nos. A-1 and A-2 are marked.

At 12:04 p.m. All are excused until 1:30 p.m. and Court is in recess until then.

At 1:30 p.m. Court is in session. All are present in the cause on trial and the trial is resumed. The defendants' Exhibits Numbered A-1 and A-3 are admitted. A-2 is withdrawn and returned to Mr. Matthews for him to have photostatic copies made. The Plaintiffs' Exhibits Numbered 4, 6 and 8 are admitted. Mr. R. P. Jandl is sworn and testifies for the plaintiffs.

At 4:13 p.m. the Plaintiffs rest.

The defendants orally challenge the sufficiency of the evidence and move to dismiss. This motion is held in abeyance. Dorothy Sawyer, Edward G. Meredith and Robert H. Wiley are sworn and testify for and on behalf of the defendants.

At 5:15 p.m. all are excused until 9:30 a.m., October 11, 1950, and Court stands adjourned until then.

Now on this 11th day of October, 1950, J. Charles Dennis, U. S. Attorney, appears for the Govern-

ment. Mr. Rolla V. Houghton and Mr. Jack R. Cluck, of Houghton, Cluck, Coughlin & Henry, appear for the Plaintiff, R. P. Jandl, etc. Julian O. Matthews, of MacBride, Matthews & Hanify; Beverly S. Wilkerson and Ward L. Sax appear for the Defendant, Eagle Star Insurance Co., Ltd., a corp.

This cause comes on before the Court without a jury for further trial. All of the parties are present through their respective counsel and the trial is resumed.

The Plaintiffs' Memo of points and authorities is filed.

Mr. Robert H. Wiley further testifies for the defendants. Mr. Kenneth Buzzell and Emmett G. Flood, Jr., are sworn and testify for and on behalf of the defendants. The Defendants' Exhibits Numbered A-4 is rejected; A-5 is admitted. Mr. Richard Charles Davidson and Lawrence J. Strong are sworn and testify for the defendants.

Court is in recess from 11:00 a.m. to 11:10 a.m. at which time Court is in session, all are present as heretofore and the trial is resumed. Mr. Lawrence J. Strong further testifies for the defendants. Mr. R. P. Jandl is called and now testifies for the defendants as an adverse witness.

At 12:02 p.m. all are excused until 1:30 p.m. and Court is in recess until 1:30 p.m. at which time Court is in session, all are present in the cause on trial as heretofore. Mr. R. P. Jandl further testifies for the defendants. The Defendants' Exhibits Numbered A-6, A-8, A-9 and A-10 are admitted. Mr.

Leon D. Cutteback and Mr. Douglas B. Miner are sworn and testify for the defendants. The Defendants' Exhibits Numbered A-11 and A-12 are admitted.

Court is in recess from 3:25 p.m. to 3:37 p.m. at which time Court is in session, all are present as heretofore and the trial is resumed. Stipulation regarding passengers on board airplane flight is filed.

Mr. Leon D. Cutteback further testifies for the defendant. Mr. John O. Vineyard is sworn and testifies for the defendants.

At 4:55 p.m. all are excused until 9:30 a.m., Thursday, October 12, 1950, and Court stands adjourned until then.

Now on this 12th day of October, 1950, J. Charles Dennis, U. S. Attorney, appears for the Government. Jack R. Cluck, of Houghton, Cluck, Coughlin & Henry, appears for the Plaintiff, R. P. Jandl. Mr. Rolla V. Houghton of said firm also appears for the Plaintiff. Julian O. Matthews, of Macbride, Matthews and Hanify appears for the Defendants, Eagle Star Insurance Co., Ltd., et al. Beverley S. Wilkerson and Ward L. Sax also appear for said Defendants.

This cause comes on before the Court without a jury for further trial. All of the parties are present through their counsel. Mr. Victor M. Ganzer is sworn and testifies for and on behalf of the defendants. Mr. A. Elliott Merrill and John B. Sweet are sworn and testify for and on behalf of the defendants. A Deposition of John Kendall, Jr., is

read. Deposition of Mr. George M. Cole is read on behalf of the defendants.

Court is in recess from 10:50 a.m. to 11:01 a.m. at which time Court is in session, all are present as heretofore and the trial is resumed. Depositions of Donald F. Lynch, James Wendell Smith and Charles S. Belknap are read on behalf of the defendants. The Defendants' Exhibits Numbered A-2 is reoffered and now rejected; A-14 and A-4 are admitted; A-7 is withdrawn and returned to defendants' counsel by stipulation of counsel. The Plaintiffs' Exhibit No. 9 is admitted. Both sides rest their case in chief.

At 11:59 a.m. Court is in recess until 1:30 p.m. and all are excused in the cause on trial until then.

At 1:35 p.m. all are present in the cause on trial.

Mr. Louis Charles Mugge is sworn and testifies for the plaintiffs on rebuttal. The Plaintiffs' Exhibit No. 10 is admitted. Mr. Robert H. Wiley and Edward R. Crook now testify for the plaintiffs.

Court is in recess from 2:53 p.m. to 3:10 p.m. at which time Court is in session, all are present as heretofore and the trial is resumed. Mr. James A. Cook, Lawrence J. Strong, Louis Charles Mugge are recalled and further testify. At 5:00 p.m. the Plaintiffs rest. John O. Vineyard is recalled by the defendants and further testifies for the defendants on surrebuttal.

At 5:08 p.m. both sides rest.

All are excused in the trial of this cause until 9:30 a.m., October 13, 1950, and Court stands adjourned until then.

Now on this 13th day of October, 1950, J. Charles Dennis, U. S. Attorney, appears for the Government. Mr. Rolla V. Houghton and Mr. Jack R. Cluck, of Houghton, Cluck, Coughlin & Henry, appears for the Plaintiff, R. P. Jandl. Mr. Julian O. Matthews, of Macbride, Matthews and Hanify, appears for the Defendant, Eagle Star Insurance Co., Ltd., et al. Beverley S. Wilkerson and Ward L. Sax also appear for said Defendant.

This cause comes on before the Court without a jury for further trial. All of the parties are present through their counsel.

The testimony having been concluded, the Court hears arguments of counsel. Mr. Rolla V. Houghton opens arguments for the Plaintiffs. Mr. Beverley S. Wilkerson opens arguments for the defendants. Mr. Julian O. Matthews closes arguments for the defendants. Mr. Jack R. Cluck closes argument for the plaintiffs.

After hearing arguments of counsel, the Court takes the cause under advisement.

At 11:55 a.m. all are excused. Court is in recess until 1:30 p.m.

Journal No. 42,

Pages, 124, 125, 126, 127, 128 and 130.

[Endorsed]: Filed July 13, 1951.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having come on regularly for trial on the 10th day of October, 1950, before the undersigned judge of the above-entitled court, sitting without a jury, the plaintiff the United States of America being represented by its attorney, J. Charles Dennis, and the plaintiffs R. P. Jandl, as Administrator of the Estate of William F. Leland, deceased, and C. W. Breakiron, Successor Receiver for Atlantic and Pacific Airlines, being represented by their attorneys, Houghton, Cluck, Coughlin & Henry, and the defendants being represented by their attorneys, Macbride, Matthews & Hanify, and oral and documentary evidence having been introduced by the parties, and the court having considered all of the evidence and the arguments of counsel, and the court having heretofore issued the court's opinion in writing, the court now makes the following

Findings of Fact

I.

That the plaintiff R. P. Jandl is the duly qualified and acting administrator of the Estate of William F. Leland, deceased, having been so appointed by the Superior Court of the State of Washington in and for the County of King, and said plaintiff has been authorized by said court to bring this action.

II.

That the plaintiff C. W. Breakiron is the duly qualified and acting Successor Receiver for Atlantic and Pacific Airlines, having been so appointed by the District Court of Galveston County, Texas, and has been authorized to join as a party plaintiff in this action.

III.

That the defendants are all subjects of the British Empire.

IV.

That exclusive of interest and costs, the matter in controversy in this action exceeds the sum of \$3,000.

V.

That on July 21, 1948, defendants issued to William F. Leland certificate of insurance No. W-OMA-253, a true copy of which is attached to the plaintiffs' amended complaint herein, which certificate insures said Leland as the owner of a Douglas DC-3 airplane No. NC 79025 as provided therein, subject, however, to the terms, conditions and limitations contained in said certificate or policy of insurance.

VI.

That said policy of insurance was in effect on January 2, 1949.

VII.

That the rights of the plaintiff United States of America and C. W. Breakiron, Successor Receiver for Atlantic and Pacific Airlines, are derivative

from and are no greater than those of William F. Leland, the insured named in said policy.

VIII.

That on January 2, 1949, at Boeing Field, Seattle, Washington, William F. Leland, the assured named in said policy, caused the acting pilot of said insured airplane to attempt to take said airplane off in flight from said field; that in said attempted take-off, said airplane became partially airborne and thereafter crashed, causing the death of said assured, William F. Leland, the pilot, co-pilot, and a number of the passengers aboard said airplane; that in said attempted take-off, said airplane struck a revetment hangar owned by King County causing damage thereto and that said aircraft was wrecked and except for small salvage was totally destroyed.

IX.

That William F. Leland, the assured, and the owner of the insured aircraft, personally failed to use due diligence and do and concur in doing all things reasonably practicable to avoid or diminish any loss or damage to the insured aircraft on January 2, 1949, when said aircraft was wrecked in an attempted take-off from Boeing Field in that said Leland negligently, carelessly and recklessly caused the acting pilot of the insured aircraft to attempt to take off in flight in dangerous weather conditions and when said insured aircraft had an accumulation of ice, snow and frost on the upper surface of its wings and fuselage and had icicles

hanging to its under surfaces, which conditions materially impaired the lifting qualities of its wings. That each and all of said conditions made it extremely unsafe to attempt to fly said aircraft, and as to all of said conditions the said assured owner personally was forewarned and had or should have had personal knowledge thereof.

X.

That all damage caused in said crash to said insured airplane and the revetment hangar located on Boeing Field which said airplane struck at the time of said crash, was proximately caused by the negligence of said Leland and by the failure of said Leland to use due diligence in the operation of said airplane as hereinabove set forth.

XI.

That in operating said airplane in the manner and under the conditions set forth above, the assured violated the express terms and conditions of said contract of insurance.

Done in Open Court this 23rd day of July, 1951.

/s/ JOHN C. BOWEN,

United States District Judge.

From the foregoing Findings of Fact, the Court now makes the following

Conclusions of Law

I.

That plaintiffs are not entitled to any of the relief prayed for in their amended complaint.

II.

That the plaintiffs' actions herein should be dismissed with prejudice without costs.

Done in Open Court this 23rd day of July, 1951.

/s/ JOHN C. BOWEN,

United States District Judge.

Presented by:

/s/ JULIAN O. MATTHEWS,

Of MacBride, Matthews & Hanify, Attorneys for Defendants.

Receipt of Copy acknowledged.

Lodged July 19, 1951.

[Endorsed]: Filed July 23, 1951.

In the District Court of the United States for the
Western District of Washington, Northern
Division

No. 2401

THE UNITED STATES OF AMERICA, R. P.
JANDL, as Administrator of the Estate of
WILLIAM F. LELAND, Deceased, and C. W.
BREAKIRON, Successor Receiver for Atlantic
and Pacific Airlines,

Plaintiffs,

vs.

EAGLE STAR INSURANCE COMPANY, LIM-
ITED; ORION INSURANCE COMPANY,
LIMITED; THE DRAKE INSURANCE
COMPANY, LIMITED, Subscribing Under-
writing Members of Lloyd's, London,

Defendants.

JUDGMENT

This Cause having come on regularly for trial on the 10th day of October, 1950, before the undersigned judge of the above-entitled court, sitting without a jury, the plaintiff The United States of America being represented by its attorney, J. Charles Dennis, and the plaintiffs R. P. Jandl, as Administrator of the Estate of William F. Leland, deceased, and C. W. Breakiron, Successor Receiver for Atlantic and Pacific Airlines, being represented by their attorneys, Houghton, Cluck, Coughlin & Henry, and the defendants being represented by their attorneys, Macbride, Matthews & Hanify, and

oral and documentary evidence having been introduced by the parties, and the court having considered all of the evidence and the arguments of counsel, and the court having heretofore entered its Findings of Fact and Conclusions of Law, and being fully advised in the premises,

It Is Hereby Ordered, Adjudged and Decreed that the plaintiffs are not entitled to any of the relief prayed for in their amended complaint and that plaintiffs' first and second causes of action be and they are hereby dismissed with prejudice.

It Is Further Ordered, Adjudged and Decreed that the defendants do not recover judgment against the plaintiffs for defendants' costs and disbursements herein and that no party recover against another any costs herein.

Done in Open Court this 23rd day of July, 1951.

/s/ JOHN C. BOWEN,

United States District Judge.

Presented by:

/s/ JULIAN O. MATTHEWS, of

MACBRIDE, MATTHEWS &
HANIFY,

Attorneys for Defendants.

Receipt of Copy acknowledged.

Lodged July 19, 1951.

[Endorsed]: Filed and entered July 23, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To Each of the Defendants Above Named and Their
Attorneys of Record:

You Are Hereby Notified that, pursuant to Rule 73, Federal Rules of Civil Procedure, each of the plaintiffs above named is taking an appeal to the United States Court of Appeals for the Ninth Circuit from the Judgment, and each and every part thereof, made by Honorable John C. Bowen and entered herein on July 24, 1951.

HOUGHTON, CLUCK,
COUGHLIN & HENRY,

Attorneys for R. P. Jandl, as Administrator of the
Estate of William L. Leland, Deceased, and
C. W. Breakiron, Successor Receiver for At-
lantic and Pacific Airlines.

/s/ J. CHARLES DENNIS,
United States Attorney, for
United States of America.

[Endorsed]: Filed August 23, 1951.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL BY PLAINTIFFS-APPELLANTS

To the Clerk of the Above-Entitled Court:

Pursuant to Rule 75 of the Federal Rules of Civil Procedure, each of the plaintiffs-appellants above named hereby designates as the contents of the record on appeal the complete record and all the proceedings and evidence in the above-entitled action.

HOUGHTON, CLUCK,
COUGHLIN & HENRY,

Attorneys for R. P. Jandl, as Administrator of the Estate of William L. Leland, Deceased, and C. W. Breakiron, Successor Receiver for Atlantic and Pacific Airlines.

/s/ J. CHARLES DENNIS,
United States Attorney, for
United States of America.

Receipt of Copy acknowledged.

[Endorsed]: Filed August 29, 1951.

[Title of District Court and Cause.]

DEFENDANTS' AND APPELLEES' DESIGNATION OF ADDITIONAL MATTER FOR RECORD

Now Come the defendants and in accordance with Rule 75(a) of the Rules of Civil Procedure designate the following as portions of the proceedings which they deem are within plaintiffs' designation but are not included in the reporter's transcript of proceedings and should be added to the record:

1. Add to the reporter's stenographic transcript of the proceedings in the district court, the attached record of the stenographer's notes.

/s/ JULIAN O. MATTHEWS, of
MACBRIDE, MATTHEWS &
HANIFY,
Counsel for Defendants.

Receipt of Copy acknowledged.

[Endorsed]: Filed September 7, 1951.

[Title of District Court and Cause.]

INTRODUCTION OF EXHIBITS
IN OPENING STATEMENT

Mr. Houghton: Paragraph V alleges that C. W. Breakiron is the duly qualified and acting Successor Receiver for Atlantic and Pacific Airlines, appointed in the case named in the complaint in the District Court of Galveston County, Texas, Tenth

Judicial District, and joins in this action pursuant to court order duly entered in that cause.

I have a certified copy of that court order, of two court orders, one appointing Mr. Breakiron as the Successor Receiver, and one authorizing him to join in this action. The stipulation provides that these copies may be admitted in evidence regardless of whether they are certified in all respects as required by the rules of this court or not, and I was wondering if it would be appropriate to have them marked and enter them at this time.

The Court: Is there any objection?

Mr. Matthews: No objection.

(Copy of court order marked Plaintiffs' Exhibit 1 for identification.)

(Copy of court order marked Plaintiffs' Exhibit 2 for identification.)

Mr. Houghton: I have here copies, uncertified, of the note and mortgage held by Breakiron, and the stipulation provides that these uncertified copies shall be admissible in evidence to the same extent and effect as if the originals or duly certified copies were produced and identified, and with that in mind, I think it might be well to offer these two copies in evidence at this time. You have no objection, Mr. Matthews?

Mr. Matthews: We have agreed not to put you to the trouble of certifying copies or bringing your witnesses here to identify them, and that these copies which you say are true may be admitted as though the originals had been identified. [2*]

The Court: Mr. Houghton, what do you understand to be the kind of thing Plaintiffs' Exhibit 1 is? Is it an attorney's employment contract?

Mr. Houghton: I take it that it is a contract employing attorneys, a court order authorizing the employment of attorneys and the maintaining of litigation here. It does not refer to this particular court, but it does authorize the receiver to employ attorneys and prosecute this particular claim.

The Court: What do you understand Plaintiffs' Exhibit 2 is in its nature?

Mr. Houghton: I think it is an order accepting the resignation of the original receiver, Edward W. Watson, and appointing Mr. Breakiron Successor Receiver in his place. The receiver's claim was originally filed by Mr. Watson, who was then the receiver. The claim was filed in Superior Court by Mr. Watson. He resigned and the Court accepted his resignation and appointed Mr. Breakiron receiver in his place. I think the net result of it now is that Mr. Breakiron is now the holder of this claim and is authorized to prosecute it here.

The Court: Do you offer each of these exhibits, Plaintiffs' Exhibits 1 and 2?

Mr. Houghton: Yes, your Honor.

The Court: Is there any objection? [3]

Mr. Matthews: No objection, your Honor.

The Court: Each of them is admitted.

(Plaintiffs' Exhibits 1 and 2 received in evidence.)

The Court: How many exhibits have you offered?

Mr. Houghton: I have offered four. I have offered the two court orders from Texas and the note and mortgage held by Mr. Breakiron.

The Court: If it is the note and second mortgage, will you let them both be marked together?

Mr. Houghton: Yes, your Honor. That makes three.

(Copies of note and mortgage marked Plaintiffs' Exhibit 3 for identification.)

Mr. Houghton: It will be noted from Plaintiffs' Exhibit 3 that this note and mortgage were originally signed by William F. Leland and Robert E. Stone.

I have here an original instrument which I probably did not call to counsel's attention, in which Mr. Leland and Mr. Stone dissolved their partnership on October 2, 1947, and Mr. Leland assumed all obligations of the partnership, including this note and second mortgage. Do you care to see it, counsel, or do you have any objection to admitting that in evidence?

The Court: Does it purport to convey to Leland any successor rights in the partnership assets? [4]

Mr. Houghton: Yes. Stone conveyed to Leland all his rights in the partnership and Leland assumed all obligations of the partnership and referred expressly to this indebtedness that was owing to this receiver.

The Court: That is a different thing from Plaintiffs' Exhibit 3. You should have it marked.

Mr. Matthews: Mr. Houghton, we would like an opportunity to examine that document. I have never heard of it or seen it, and I will do so at the first opportunity.

Mr. Houghton: Let it be admitted subject to your examination. It does not affect your rights.

(Agreement marked Plaintiffs' Exhibit 4 for identification.)

The Court: It has been marked Plaintiffs' Exhibit 4 for identification, and as to whether or when it may be offered and/or admitted is another question.

Mr. Houghton: It is offered in evidence at this time, your Honor.

The Court: The Court will reserve ruling until counsel for defendants has an opportunity to examine it. I would like to ask Mr. Houghton if he can give it a name which reflects the character of the information, the briefest possible name.

Mr. Houghton: Yes, dissolution of partnership.

The Court: Of the Leland-Stone partnership, is that [5] right?

Mr. Houghton: That is correct.

Mr. Houghton: This is section 10 of the stipulation, your Honor, on page 4. "It is stipulated that Exhibit H attached hereto is a true copy of a letter written by the attorneys for the plaintiff administrator to Merrill P. Totten & Company, Insurance adjusters designated by defendants to represent them in the handling of claims under the policy sued

on in this action, and that the same shall be admissible in evidence to the same extent as, but no greater extent than, the original letter would be if identified and offered in evidence.”

That is a letter, dated May 13, 1949, signed by myself, and addressed to Morrell P. Totten & Company, 15th Floor, 821 Second Avenue Building, Seattle, Washington, Re: Lloyd’s Certificate W-OMA-253 on Douglas DC-3 NC 79025, Estate of William F. Leland.

“Gentlemen: It has been more than four months since the above plane was destroyed and we have had no indication as to when, if ever, settlement can be expected on the above policy. We feel that the matter has been allowed to run long enough and are writing to advise you that unless your company either pays the policy or gives definite indication of its intention to pay it by May 19, 1949, we expect to [6] apply to the Probate Department of the Superior Court of King County for authority to sue on the certificate. Yours very truly, R. V. Houghton.”

That was written on the stationery of Houghton, Cluck, Coughlin & Henry. At this time, your Honor, I offer that letter in evidence.

The Court: Let it be marked Plaintiffs’ Exhibit 5.

(Copy of letter of 5-13-49, marked Plaintiffs’ Exhibit 5 for identification.)

Mr. Houghton: Will your Honor simply mark the copy that is attached to the exhibit, or will you prefer——

The Court: If you have another copy, it would be better. Do you offer that in evidence?

Mr. Houghton: I do.

The Court: Is there any objection?

Mr. Matthews: No objection, your Honor.

The Court: Admitted.

(Plaintiffs' Exhibit 5 received in evidence.)

Mr. Houghton: Paragraph 5 of the stipulation provides that: "If either party desires to introduce in evidence at the trial of this cause any part of the records of the Superior Court of the State of Washington for King County in Probate Proceeding No. 109506 entitled: 'In the Matter of the [7] Estate of William F. Leland,' " or in Cause No. 413677, entitled King County v. Jandl, it shall not be necessary for him to procure certified copies or authenticated copies, but he may submit uncertified copies and submit them to the attorney for the other side, and if they are found to be true copies, they will be admitted to the same extent and effect as if they were duly certified or authenticated copies.

With that in mind, I have, Mr. Matthews, copies here of the summons and complaint, the answer, the memorandum decision, the findings of fact and conclusions of law and the judgment in this case of King County v. Leland, which I now wish to offer in evidence.

The Court: Let it be marked Plaintiffs' Exhibit 6.

(Copies of files in Cause No. 413677 marked Plaintiffs' Exhibit 6 for identification.)

Mr. Houghton: It is King County v. Jandl as Administrator of Leland's estate. Part of them have been sent to Mr. Matthews in the past. The judgment was only entered on the 9th of October, that was yesterday, and I believe they brought down the original file. These may all be marked as an exhibit, and I offer them in evidence.

Mr. Matthews: I have no objection to the summons and complaint, the answer and the reply, or to the findings of fact, conclusions of law and judgment. I do not believe the memorandum opinion is material or competent or relevant [8] or proof of any fact at issue in this case.

Mr. Houghton: In that case, we will consent to removing the memorandum opinion.

The Court: Counsel may take that out.

Mr. Houghton: We will reserve the right to offer it later if we think it is material to any issue in the case.

The Court: Do you offer Plaintiffs' Exhibit 6, comprising the remainder of the papers mentioned?

Mr. Houghton: Yes.

Mr. Matthews: I have not examined the findings of fact and conclusions of law. They were just entered yesterday. I have not seen them.

Mr. Houghton: A copy was sent to you, except I think the attorney made a repetition of the claim of negligence, which would be to your benefit, if anything.

The Court: At the recess counsel for defendant may look at these papers and see if there is any objection he wishes to make.

Mr. Houghton: Does the Court reserve their admission?

The Court: I do.

Mr. Houghton: Section 7 of the stipulation states: "It is stipulated that Exhibits E, F and G, attached hereto, are copies of letters written by plaintiff Jandl's attorneys, Houghton, Cluck, Coughlin & Henry, to defendants' agent D. K. MacDonald & Company regarding the claim and suit of [9] King County, Washington, mentioned in plaintiffs' amended complaint, second claim, paragraph II, and that such copies shall be admissible in evidence to the same extent as, but no greater extent than, the original letters would be if identified and offered in evidence."

These letters that are attached to the stipulation, marked Exhibits E, F and G, are letters written to D. K. MacDonald & Company advising them of the filing of this claim by Leland, tendering them the defense of the suit, and notifying them that if they fail to defend the suit the Administrator, Jandl, would employ counsel and defend it. The statements in that regard are summed up in the last paragraph of Exhibit G: "The Administrator considers"—

The Court: Is it in evidence?

Mr. Houghton: I am going to offer these. I was calling attention to what they were.

The Court: Let the papers be in evidence before you read them as if they were.

Mr. Houghton: Thank you, your Honor. I offer these three exhibits, E, F and G, as attached to the stipulation, in evidence.

The Court: Let them all be marked Plaintiffs' Exhibit 7.

(Copies of letters of 7-8-49, 11-4-49, and 2-1-50, marked Plaintiffs' Exhibit 7 for identification.) [10]

Mr. Houghton: Plaintiffs' Exhibit 7 is offered in evidence, your Honor.

Mr. Matthews: No objection.

The Court: Admitted.

(Plaintiffs' Exhibit 7 received in evidence.)

Mr. Matthews: We have entered into a stipulation concerning the introduction of certain records in an effort to save time, and, Mr. Houghton, I would now like to offer in evidence as our first exhibit the application made by the Seattle Air Charter to the Department of Commerce for an extension of time in which to comply with the regulation to which I have just referred with respect to fireproofing, and the reply received from R. D. Bedinger, the Regional Administrator. I understand you have also been furnished a copy.

Mr. Houghton: We did not actually get one. I guess they had one there for us, but we did not go after it, so if we could just glance through it, I am sure it is all right.

(Letters of 11-29-48, and 12-1-48, marked Defendants' Exhibit A-1 for identification.)

The Court: What do you call that, if you can give it a name agreeable to all counsel?

Mr. Matthews: I would say it was the application to [11] the Civil Aeronautics Authority in connection with the fireproofing requirements.

The Court: For time extension for compliance?

Mr. Matthews: Yes.

The Court: Application for time extension for compliance?

Mr. Matthews: And letter granting the extension.

With respect to establishing the weight of the airplane, your Honor, it became necessary to establish the weight of the various passengers that were aboard the airplane, and to save the expense of taking depositions or bringing the students here, many of whom are scattered in various parts of the country, we stipulated that the records of Yale University, the Health Department at Yale University, certified by the custodian thereof, might be offered in evidence with the same effect as though the custodian were present and testified that these were the records of Yale University, kept in the ordinary course of business.

I have just handed to the clerk a photostatic copy of those records. As to one boy by the name of Adams, I took up with Mr. Cluck the question of his weight and it was agreed between us if Mr. Adams, who lives in Corvallis, Oregon, were to send a telegram stating what his weight was at the time he boarded the plane, that that telegram might be admitted in evidence with the same force and effect

as [12] though Mr. Adams, one of the passengers, was here testifying to his weight. I now offer in evidence the records we have obtained and the telegram to which I have just referred.

(Records of Yale University marked Defendants' Exhibit A-2 for identification.)

Mr. Matthews: I might say in connection with those that Yale University said they would have to obliterate from the record anything that had to do with other than the boy's age and weight, because that would be information of a confidential nature, and that has been done as certified.

The Court: Why did you not get white background photostats?

Mr. Matthews: I wish I had done that, your Honor. It would have meant photostating them twice, and I had to do it over the telephone, and that is what they sent us and they did not arrive until day before yesterday.

The Court: I think the Court will have to make a rule on that, because it seems I cannot get the word around among members of the bar. I am going to have to make a rule that nothing but white background photostats will be received in evidence and then leave counsel to their own devices.

Mr. Matthews: I will have these rephotostated, your Honor. The second photostat will come out white.

Mr. Cluck: If I understood you correctly that you are now offering these in evidence, we will have objections [13] to offer to their admissibility, as we

told you, having stipulated only as to the matter of formal certification, so we would like an opportunity to see the proffered exhibit and then tender objections to its admissibility. We strongly object to its admission.

The Court: Can you get the white photostats between now and tomorrow morning?

Mr. Matthews: Yes, your Honor.

The Court: Doubtless there are local businesses prepared to do it. Then I suggest that they be returned to counsel for that purpose.

Mr. Matthews: Mr. Cluck, have I correctly stated the stipulation between us concerning the telegram and the fact that the records can be considered as though the custodian was here testifying that they are the official records of Yale University?

Mr. Cluck: Yes. I think we should have the language of the stipulation before the Court, if you care to read it. "Copies of any records of Yale University"—that is the second paragraph on the first page of the stipulation—"or any of its departments, certified to be true copies of such records by any person who certifies that he has custody or possession thereof, shall be admissible in evidence in this cause to the same extent as, but no greater extent than, the original records would be if the official custodian thereof [14] produced them in open court and testified to their genuineness."

In other words, the purpose of that stipulation, as you know, was to eliminate the inconvenience of formal certification, but objections on every other

ground are preserved and we will have objections to offer.

Mr. Matthews: Do you mind looking at the certificate and telling me if you have any objection to the form of the certificate?

Mr. Cluck: There is no objection as to the form of the certificate.

Mr. Matthews: And the telegram?

Mr. Cluck: You stated correctly the stipulation, that as to the single student, Robert R. Adams, we stipulated as you stated.

The Court: Defendants' Exhibit A-2 is now withdrawn and returned to counsel who produced it so that he may then put it in such condition as will be more legible and readable.

Mr. Houghton: May it please the Court, before we start on the testimony, were Exhibits 4 and 6 admitted? They were reserved while counsel checked them. Exhibit 4 was that partnership dissolution between Leland and his partner.

The Court: I have not yet ruled upon it. Do you [15] offer it?

Mr. Houghton: Yes, I offer Exhibit 4.

The Court: Any objection?

Mr. Matthews: May I see them?

The Court: Let him see also Plaintiffs' Exhibit 6.

Mr. Wilkerson: We have examined Exhibit 6 and have no objection to its admission.

The Court: Plaintiffs' Exhibit 6 is now admitted.

(Plaintiffs' Exhibit 6 received in evidence.)

Mr. Wilkerson: We have no objection to Plaintiffs' Exhibit 4.

The Court: Plaintiffs' Exhibit 4 is now admitted.

(Plaintiffs' Exhibit 4 received in evidence.)

The Court: Defendants' Exhibit A-1 has not been ruled upon as to admissibility.

Mr. Houghton: Counsel offered Defendants' Exhibit A-1. We have no objection to the admission of that.

The Court: Defendants' Exhibit A-1 is now admitted.

(Defendants' Exhibit A-1 received in evidence.)

(Copy of memorandum opinion marked Plaintiffs' Exhibit 8 for identification.) [16]

Mr. Houghton: Your Honor, what has been marked Plaintiffs' Exhibit 8 for identification is the copy of the Court's memorandum decision in this case of Leland vs. King County. I offer that in evidence on the basis that I think it is proper and material to have that additional portion of the record in that case in evidence.

The Court: Is there any objection?

Mr. Matthews: It is objected to as incompetent, irrelevant and immaterial.

The Court: On what issue do you offer it?

Mr. Houghton: Just on the general issue in the case.

The Court: I wish you would state the issue. What do you seek to prove by this?

Mr. Houghton: Simply that recovery was had by the County, and that is a part of the file.

The Court: Was it on the second claim?

Mr. Houghton: Yes, your Honor.

The Court: Does it purport to fix the amount of recovery of the County from the insured?

Mr. Houghton: No, sir. The judgment, I think, does that. You have there a copy of the judgment rendered by the Court. It simply shows the basis for the Court's judgment.

The Court: The objection is overruled. Plaintiffs' Exhibit 8 is now admitted.

(Plaintiffs' Exhibit 8 received in [17] evidence.)

[Title of District Court and Cause.]

PROCEEDINGS AT TIME OF ENTERING
FINDINGS OF FACT, CONCLUSIONS OF
LAW AND JUDGMENT ON JULY 23, 1951

The Court: In the case of United States of America, R. P. Jandl and others against Eagle Star Insurance Co., Ltd., and others, are parties and counsel present representing all of the litigants?

Mr. Cluck: They are, your Honor, except that counsel for the United States of America is not present.

The Court: Do you know why?

Mr. Cluck: I do not, your Honor.

The Court: We will proceed.

Mr. Matthews: We have submitted, your Honor,

proposed forms of findings of fact, conclusions of law and judgment. We have lodged the original with the clerk of the Court and have served both the United States and Mr. Houghton and Mr. Cluck.

The Court: Is there any objection to the form?

Mr. Matthews: No objections have been served upon us, your Honor.

The Court: Did any of you have any conversation with the United States Attorney or anyone representing him and his office?

Mr. Cluck: No, we did not, your Honor. I am not sure that I had the full meaning of your question as to whether or not there was any [18] objection.

The Court: What I am trying to find out is does anyone present know of some reason why the United States Attorney has elected not to be present?

Mr. Cluck: No, we do not.

Mr. Wilkerson: I might say at the trial Mr. Dennis asked to be excused, saying that he was perfectly willing to have Mr. Houghton and Mr. Cluck represent him, and it is possible he still has that in mind.

The Court: I rather suspect that the office has unintentionally overlooked the hour. I would like to ask one of the plaintiffs' counsel, do you feel agreeable to reminding the United States Attorney's office of the appointment and feel it would be appropriate to be excused for a moment while that is done?

Mr. Cluck: We so request, your Honor.

The Court: The Court will extend a few mo-

ments. I would suggest that you try to see Mr. Dennis if you can, Mr. Cluck. You are excused for a few minutes.

(Recess.)

Mr. Cluck: If the Court please, Mr. Dennis had not overlooked the matter but stated that he is occupied with grand jury work and asked that Mr. Houghton and myself go ahead with it.

The Court: Are you willing to do that?

Mr. Cluck: Yes, we are. [19]

The Court: I will hear any objections which counsel for plaintiffs may wish to state.

Mr. Cluck: If the Court please, we object to paragraphs IX to XI, inclusive, of the findings on the ground that the evidence does not sustain the finding either that there was negligence on the part of the insured, or, if there was, that any damage referred to in the action was caused thereby.

Since present court rules do not require the making of exceptions to findings, we want to be clear that express reference to any numbered finding does not constitute a waiver to any other.

There is one particular phase of the proposed findings, I think should require the attention of the Court, and that is the reference to overloading. That is found on page 3, paragraph IX, lines 25 to 29, inclusive. The Court's written opinion does not refer to overloading.

When the matter came up in the course of trial, I think your Honor will recall that there was no weighing in of the baggage, and that the proof

offered consisted entirely, as I recall, or at least primarily, of certain witnesses who simply felt and lifted the baggage and from that only sought to give judgment of what each consisted of. In fact, witnesses actually didn't lift each; they looked at them. I emphasize that because the Court will remember making a [20] cryptic observation to the effect that he could see, if pork was involved, how one could estimate the weight of porkers by looking at them, but not baggage where no one knew what the inside of the baggage was.

I think it significant that the Court did not make a finding in the matter of overloading, and reference here in the proposed draft actually goes beyond what the Court has found. I refer to the language starting in line 25, page 3: "* * * and at a time when said airplane was loaded in excess of the maximum take-off weight limit permitted by the operation record or limitations for said airplane and the applicable rules and regulations of the United States Government pertaining to civil aviation." That that condition existed and the accident occurred when it obtained. I think the record will show conclusively when it is transcribed that the Court at the very time when this evidence was given commented upon it in the manner we just indicated.

Mr. Wilkerson: If the Court please, counsel has overlooked in his statement a considerable portion of the evidence concerning the overloading.

The Court: What about his overlooking the

scope of the Court's discussion in the opinion and decision of the Court? Was there a comment on the scope of the Court's expressed opinion and decision at variance with the fact, or was it in keeping with the fact? [21]

Mr. Wilkerson: I think the Court made no express mention in the Court's opinion concerning weight. The Court found the assured was negligent in taking off under conditions then existing. It is true no specific mention was made of the weight. However, in the evidence presented to your Honor in the case, the evidence was clearcut that the maximum take-off weight permitted for this airplane was 25,346 pounds. The dry weight of the airplane was admitted, which was 17,696 pounds.

It was shown that there were thirty members of the crew and passengers aboard, and computing their weight in accordance with the regulations of the Civil Aeronautics Authority, that weight totals 5,100 pounds. Computing the weight of the gasoline which was aboard, 600 gallons, at 6 pounds per gallon, also in accordance with the regulations of the Civil Aeronautics Authority, we find that is 3,600 pounds. The weight of the baggage, as shown by the testimony of a boy who helped load it, was that there was considerably in excess of 40 pounds per person for the passengers aboard and that would make 1,080 pounds, so that the plane, according to the clearcut testimony, was overloaded 1230 pounds without any baggage at all. It was overloaded over 1,000 pounds excluding any baggage whatsoever from consideration.

I thought it was entirely within the scope of your Honor's decision that the insured was negligent in taking off [22] under such conditions to include a finding concerning weight on the clearcut evidence which was presented to your Honor.

The Court: Gentlemen, the Court did not express an opinion about the overloading for one reason. I will say it was not because I had an opinion that there was not overloading, but it was largely due to the fact that when the Trial Court finds on one issue of fact that there is a necessary result, that that is sufficient for the decision, and that is the reason the Court omitted to make a finding on the question of overloading.

The question of overloading was one of several, two or more, alleged fact conditions which defendant pleaded as a basis for its concluding allegation that the terms and conditions of the policy were breached by the assured and contended for the right to have the Court's decision that the policy had been voided by such condition breach, and when the Court found in defendant's favor as to one alleged fact, I felt that that was sufficient and I am willing to leave the Court's decision upon the Court's expressed finding, or the expressed condition as stated in the Court's opinion, as to the policy condition breach, and I respectfully decline to include any other factual findings or reasons for arriving at the decision announced by the Court.

So I would prefer to eliminate this language which involves that question of overloading. I am [23] considering striking out the words after the comma

following the word "wings" in line 25 down to and including the word "aviation" in line 29, and making a period instead of a comma following "wings" in line 25.

Do the findings and conclusions say anything about costs?

Mr. Wilkerson: Yes, they do, your Honor.

The Court: I would like to have argument made now, any and all contentions which you might wish to make regarding costs.

Mr. Wilkerson: It is the position of the defendant that, having prevailed, they should be entitled to costs except as against the plaintiff United States, conceding that they have no right to recover costs from the United States.

The Court: Do you know what the costs taxable would amount to?

Mr. Wilkerson: I do not know exactly, your Honor. It would be a matter of the witness' fees in the case. I should think probably not in excess of \$50, but that is a rough guess.

Mr. Matthews: My guess would be they would run considerably higher than that. I think you have forgotten about the depositions we took of the Yale students.

Mr. Wilkerson: I had overlooked the fact that we [24] had taken depositions.

Mr. Matthews: We provided the Court would reserve jurisdiction.

The Court: I do not wish to leave anything else for the Court to do in this case. I wish to do it

today and let this be the final judgment of the Court, so the aggrieved parties, if they desire, can take steps for appeal. So far as this Court is concerned, this is expected to be the final proceeding in the Trial Court concerning trial of the case.

Is there any change in the rules or anything in the rules before any such change which makes it illegal for the Court to omit to award costs in favor of either party as against the other in this case? I am considering making an order that neither party recover costs against the other and that each and all parties stand their own costs.

Mr. Wilkerson: I think your Honor has stated it correctly, that it is discretionary with your Honor.

The Court: I wish to do that, and then I would like to have special attention directed to any words that are contrary to that.

Mr. Wilkerson: In paragraph III of the conclusions of law.

The Court: Is that the first place the subject is mentioned?

Mr. Wilkerson: Yes, your Honor. [25]

The Court: I am inclined to say "without costs."

Mr. Wilkerson: The paragraph should be stricken entirely or changed so that no party recover costs.

The Court: I believe the matter could be disposed of in accordance with the Court's views by adding after the last word in the second paragraph "without costs."

Mr. Wilkerson: I think so, and strike paragraph III.

The Court: I will strike out entirely the third paragraph of the conclusions.

Mr. Wilkerson: Then I call your Honor's attention to the second ordering paragraph in the judgment as also pertaining to costs.

The Court: Is it true that counsel for defendants alone have requested findings of fact, conclusions of law and judgment in any particular form?

Mr. Wilkerson: That is true, your Honor.

The Court: As to costs, on the second page of the judgment, since you are using the words, I am thinking of striking "have and" in line 1 and substituting in place of them "do not," and striking out in lines 2, 3, and 4 the words in line 2 after "herein" and continuing to and including the word "order" in line 4.

In view of the fact that those words are now left as they are, "It is further ordered, adjudged and decreed that the defendants do not recover judgment against the [26] plaintiffs for defendants' costs and disbursements herein," would it be appropriate and more completely covered if the Court made a statement as to whether or not anyone should recover costs herein? "And that no party herein recover costs against the other," would that cover it?

Mr. Wilkerson: I think that would be appropriate, your Honor, under the circumstances.

The Court: "And that no party recover against another any costs herein." Is there any objection to those words? I wish counsel on both sides would finally inspect these papers to see if you have any

objection to those interlineations and to the findings, conclusions and judgment in the form now about to be approved by the Court.

Mr. Matthews: I think the changes which the Court made properly carry out the Court's ruling.

Mr. Cluck: No objection as to form, your Honor.

The Court: I wish each of you would look at your copy of the Court's opinion. On the first page, line 29, the word "principal," used by the Court as an adjective, was erroneously spelled as a noun. It should be —pal instead of —ple, and the Court makes that correction on the Court's copy.

Mr. Cluck: It is such a minor matter, but we might make a correction on page 2, line 31. The second word, recklessly, should be spelled without a w. [27]

The Court: Thank you. Do you find any others?

Mr. Cluck: We did not, your Honor.

Mr. Wilkerson: We did not either, your Honor.

The Court: I have made those changes. Let the findings of fact, conclusions of law and judgment in this case be now entered.

Are there any other things to be done today in this case? If not, counsel are excused.

[Endorsed]: Filed September 7, 1951. [28]

[Title of District Court and Cause.]

ORDER DIRECTING TRANSMITTAL OF
ORIGINAL EXHIBITS AS PART OF
RECORD ON APPEAL

Upon stipulation of the parties,

It Is Ordered that the Clerk of this court transmit
all of the original exhibits filed herein as part of
the record on appeal in this case.

Done in Open Court this 25th day of September,
1951.

/s/ JOHN C. BOWEN,

United States District Judge.

Presented by:

/s/ R. V. HOUGHTON, of

HOUGHTON, CLUCK,

COUGHLIN & HENRY,

Attorneys for Plaintiff R. P. Jandl, as Adminis-
trator of the Estate of William F. Leland,
Deceased, and Plaintiff C. W. Breakiron, Suc-
cessor Receiver for Atlantic and Pacific Air-
lines.

Approved for entry:

MACBRIDE, MATTHEWS &
HANIFY,

Attorneys for Defendants.

/s/ J. CHARLES DENNIS,

United States Attorney.

[Endorsed]: Filed September 25, 1951.

In the District Court of the United States for the
Western District of Washington, Northern
Division

No. 2401

THE UNITED STATES OF AMERICA, R. P.
JANDL, as Administrator of the Estate of
William F. LeLand, Deceased, and C. W.
BREAKIRON, Successor Receiver for Atlan-
tic and Pacific Airlines,

Plaintiffs,

vs.

EAGLE STAR INSURANCE COMPANY, LIM-
ITED; ORION INSURANCE COMPANY,
LIMITED; THE DRAKE INSURANCE
COMPANY, LIMITED, Subscribing Under-
writing Members of Lloyd's, London,

Defendants.

Before: The Honorable John C. Bowen,
District Judge.

TRANSCRIPT OF PROCEEDINGS AT TRIAL

October 10, 1950, 10:00 A.M.

Appearances:

J. Charles Dennis, United States Attorney, ap-
peared for plaintiff United States of America. Rolla
V. Houghton and Jack R. Cluck of Houghton,
Cluck, Coughlin & Henry appeared for plaintiff R.
P. Jandl as Administrator of the Estate of William
F. Leland, Deceased.

Julian O. Matthews and Ward L. Sax of Macbride, Matthews & Hanify and Beverly S. Wilkerson appeared for defendants.

Whereupon, opening statements having been made by counsel for plaintiffs and counsel for defendants, the following proceedings were had and done, to wit:

(Copy of court order marked Plaintiffs' Exhibit 1 for identification.)

(Copy of court order marked Plaintiffs' Exhibit 2 for identification.)

(Copies of note and mortgage marked Plaintiffs' Exhibit 3 for identification.)

(Agreement marked Plaintiffs' Exhibit 4 for identification.) [2*]

(Copy of letter of 5-13-49 marked Plaintiffs' Exhibit 5 for identification.)

(Copies of files in Cause No. 413677 marked Plaintiffs' Exhibit 6 for identification.)

(Copies of letters of 7-8-49, 11-4-49 and 2-1-50 marked Plaintiffs' Exhibit 7 for identification.)

(Letters of 11-29-48 and 12-1-48 marked Defendants' Exhibit A-1 for identification.)

(Records of Yale University marked Defendants' Exhibit A-2 for identification.)

(Plaintiffs' Exhibits 1, 2, 3, 5 and 7 received in evidence.)

* Page numbering appearing at foot of page of original Reporter's Transcript of Record.

(Copy of memorandum opinion marked Plaintiffs' Exhibit 8 for identification.)

(Plaintiffs' Exhibits 4, 6 and 8 received in evidence.)

PLAINTIFFS' EXHIBIT No. 6

In the Superior Court of the State of Washington,
in and for the County of King

No. 413677

KING COUNTY, a Municipal Corporation, of the
State of Washington,

Plaintiff,

vs.

R. P. JANDL, as Administrator of the Estate of
William F. Leland, Deceased,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

This matter having regularly come on for trial before the Honorable Robert M. Jones, Judge of the above-entitled court, plaintiff appearing by its attorneys of record, Charles O. Carroll, Prosecuting Attorney, and K. G. Smiles, Deputy Prosecuting Attorney; defendant being present in person and being represented by his attorneys of record, Houghton, Cluck, Coughlin & Henry, and plaintiff and defendant having introduced evidence and exhibits and the court having heard the testimony

of witnesses on behalf of plaintiff and defendant and being fully advised in the premises, does hereby make the following:

Findings of Fact

I.

That the above-named plaintiff is now and at all times herein mentioned was a municipal corporation organized under and by virtue of the laws of the State of Washington. That plaintiff was and now is the owner of what is commonly known as Boeing Field, a municipal airport in King County, State of Washington.

II.

That William F. Leland died intestate in King County, Washington, on or about January 2, 1949, as the result of an airplane crash at Boeing Field, Seattle, Washington. At said time and place William F. Leland was the owner of a DC-3 Airplane which was being operated by either William F. Leland or one of his employees and agents. That at said time and place the said airplane was being operated for and on behalf of William F. Leland and in the course and scope of his business as a common carrier and operator of a public charter airplane service. That at said time and place said airplane was being operated in a negligent manner.

III.

That thereafter such things were had and done that R. P. Jandl was named as Administrator of the Estate of the said William F. Leland, deceased,

was appointed, qualified and is now acting as such Administrator.

IV.

That at the time of said airplane crash, William F. Leland was negligent in the operation of said airplane and did not exercise reasonable and ordinary care under the circumstances and conditions existing at said time and place.

V.

That as a direct and proximate result of the negligent operation of said airplane by William F. Leland or his agent, the said airplane crashed into what is known as a revetment hangar on Boeing Field, Seattle, Washington, resulting in damage to said revetment hangar in the amount of \$2,566.70. That the damage to said revetment hangar was caused solely and proximately by the negligence of the said William F. Leland or his agent. That in addition to the damage to said revetment hangar plaintiff has a claim against said estate in the sum of \$118.00 for field charges for December, 1948, January, February and March, 1949.

VI.

That plaintiff, King County, a municipal corporation, filed its duly verified claim against the Estate of William F. Leland on June 16, 1949, after serving a copy of said claim upon the defendant herein and the attorneys for said estate, to wit: Houghton, Cluck, Coughlin & Henry.

VII.

That on the 28th day of September, 1949, the said attorneys, Houghton, Cluck, Coughlin & Henry, notified plaintiff by registered mail of the rejection of said claim in its entirety with the exception of the sum of \$118.00 for field charges. That the claim for damages to said revetment hangar was rejected in its entirety.

VIII.

That the above-entitled action was commenced within thirty days of the date of the rejection of plaintiff's claim against the estate of William F. Leland.

Done in Open Court this 9th day of October, 1950.

ROBERT M. JONES,
Judge.

Conclusions of Law

From the foregoing Findings of Fact, the court makes the following Conclusions of Law:

I.

That plaintiff is entitled to judgment against the defendant in the sum of \$2566.70, together with its costs and disbursements herein to be taxed.

Done in Open Court this 9th day of October, 1950.

ROBERT M. JONES,
Judge.

Presented by:

K. G. SMILES,
One of the Attorneys for
Plaintiff.

Approved as to Form:

R. V. HOUGHTON,
Of Attorneys for Defendant.

(Copy)

In the Superior Court of the State of Washington,
in and for the County of King

No. 41377

KING COUNTY, a Municipal Corporation of the
State of Washington,

Plaintiff,

vs.

R. P. JANDL, as Administrator of the Estate of
William F. Leland, Deceased,

Defendant.

JUDGMENT

This Matter having regularly come on for trial before the Honorable Robert M. Jones on the 29th day of June, 1950, plaintiff being represented by its attorneys of record, Charles O. Carroll, Prosecuting Attorney of King County, Washington, and K. G. Smiles, Deputy Prosecuting Attorney; defendant being present in person and being represented by his attorneys of record, Houghton,

Cluck, Coughlin & Henry; plaintiff and defendant both having introduced evidence and exhibits and the court having heard the testimony adduced on behalf of plaintiff and defendant and having heretofore entered its Findings of Fact and Conclusions of Law finding and concluding that plaintiff is entitled to judgment against the defendant.

It Is Hereby Ordered, Adjudged and Decreed that plaintiff have and recover from defendant the sum of \$2566.70, together with interest on said sum from the date of this Judgment together with plaintiff's costs and disbursements herein to be taxed.

Done in Open Court this 9th day of October, 1950.

ROBERT M. JONES,
Judge.

Presented by:

K. G. SMILES,
One of the Attorneys for
Plaintiff.

Approved as to Form:

R. V. HOUGHTON,
Of Attorneys for Defendant.

Admitted October 10, 1950.

PLAINTIFFS' EXHIBIT No. 8

In the Superior Court of the State of Washington
for King County

No. 413677

KING COUNTY, a Municipal Corporation of the
State of Washington,

Plaintiff,

vs.

R. P. JANDL, as Administrator of the Estate of
William F. Leland, Deceased,

Defendant.

MEMORANDUM OPINION

KENNETH G. SMILES,

Assistant Prosecuting Attorney, Attorney for
Plaintiff.

HOUGHTON, CLUCK, COUGHLIN & HENRY,
Attorneys for Defendant.

This is a suit by King County against the administrator of the estate of William F. Leland, deceased, seeking recovery of damages arising out of the collision of the airplane of the decedent with a hangar of the plaintiff at Boeing Field. The defendant's intestate was killed in the accident, but the county proceeds under § 1520, Rem. Rev. Stat. Counsel for the defendant concedes that under the interpretations of this statute the action survives against the personal representative, thus developing the anomalous situation under which pas-

sengers in the plane who were killed, or rather their representatives, would have no right of action against the administrator for death of the passenger, but would have a right to pursue the cause of action for damage to lost baggage.

The plane in question was the one which was to carry the Yale students. There was a dense fog and a temperature below freezing. Ice was forming upon the wings of this plane. A Mr. Miner did maintenance work upon this particular airplane. He inspected the plane and testifies that its condition was good. He had on three occasions that evening attempted to clear ice from the plane. On two occasions he had brushed snow off the wings and then attempted to wash off the ice. His last effort, which was fifteen minutes before the take-off, was to wash the wings with alcohol. Within a few minutes of the time this plane attempted to take off, two other planes left the field. The wings, however, of those planes had been protected by some form of covering. The decedent Leland was in the plane. With him was a Mr. Chavers, his employee, and another pilot. It appears that Chavers was denominated as the captain of the plane. About thirty minutes before the fatal take-off, Chavers called a Mr. Vineyard to come down to the field and advise him as to whether or not the flight should be attempted. Vineyard went to the airfield, examined the plane, found ice on it, which in his opinion was enough to affect the plane's flying ability, and he advised Chavers against attempting the flight. He testifies that the plane in his opinion

was not safe for operation. The plane, however, loaded with its human cargo, taxied down to the northern end of the field and warmed up. It made the run toward the south in an attempt to take off, and from the objective evidence upon the ground it was twice in the air and then swerved to the left on the ground, crashed into the hangar and caught fire, in which accident Leland, Chavers and the other pilot were killed.

Plaintiff contends that the take-off constituted negligence after Vineyard had given his opinion that such an attempt was unsafe. It is to be remembered that the other two planes, at or about the same time, safely made their flights. Whether the swerving of the plane was due to ice upon the wings is in my opinion speculative. It therefore follows that for the plaintiff to prevail, it must do so upon the doctrine of *res ipsa loquitur*. This is not a situation where a plane in the air may come in contact with conditions which the operator in the exercise of reasonable care could not foresee or guard against. It is a case where the plane, in speeding down the runway in an attempt to take off, swerves from its course, and such swerving could potentially arise from carelessness on the part of the operator or inability of the operator to see where he was going or some mechanical defect in the intricate machinery of the plane. The plane was completely wrecked. Neither the owner nor the two pilots are available to testify as to what happened, nor do we know who was at the controls.

Passenger planes by the hundreds and thousands

daily take-off from field such as this. Accidents frequently occur in the air, to which accidents the doctrine of *res ipsa loquitur* may or may not be applicable. Certainly the veering of the plane from the runway is an accident which normally and ordinarily does not occur unless there is a mechanical failure or a human failure, and when the accident and the circumstances attending it are so unusual and of such a nature that it could not well have happened without negligence, a presumption of negligence on the part of the operator arises from the proof of such facts. Here there is the testimony of a Mr. Fennell who suggests many things that might have caused the accident, but in all, his testimony is wholly opinion testimony and in my opinion does not rebut the inference of negligence which I think arises from all of the facts and circumstances.

I therefore conclude that plaintiff is entitled to recover.

Dated This 25th day of July, 1950.

ROBERT M. JONES,
Judge.

Admitted October 10, 1950.

Mr. Houghton: I will call Mr. Jandl as a witness.

R. P. JANDL

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Houghton:

Q. Your name, please? [3]

A. R. P. Jandl.

Q. Are you the administrator of the estate of William F. Leland, deceased? A. Yes.

Q. One of the plaintiffs in this case?

A. Yes.

Q. Mr. Jandl, did you incur any expense in preparing the defense of the case of King County v. Jandl, Administrator? A. Yes.

Mr. Matthews: We admit the \$34 of expense, Mr. Houghton.

Mr. Houghton: \$34.90?

Mr. Matthews: Yes.

Mr. Houghton: Thank you. No further questions. Do you care to cross-examine?

Mr. Matthews: He is going to remain in attendance, is he?

Mr. Houghton: Yes, he will.

Mr. Matthews: That is all.

The Court: You may step down.

(Witness excused.)

Mr. Houghton: Your Honor, I don't think I need to call another witness at this time, but I want to call your Honor's attention to one thing so as to possibly make the reservation in connection with it, and that is with regard to the proof on the value of this plane. [4] The insurance policy which is in evidence as a part of the complaint states agreed value, \$25,000. The answer of the defendants on the point states in paragraph V: "Answering Paragraph V of said complaint, defendants admit that on January 2, 1949, the aircraft above referred to crashed and burned in an attempted take-off at Boeing Field, King County, Washington, and that said aircraft suffered severe damage as the result of such happening and admit that the actual and agreed value of said aircraft is as provided in said certificate of insurance."

In the stipulation, it is agreed that the plane was totally destroyed except for salvage worth \$390. It is our opinion at this time that this statement of agreed value in the policy, together with the admission in the answer that the actual and agreed value of said aircraft is as provided in said certificate of insurance, makes a prima facie case as to the value of the plane, and I don't care to take the Court's time with going into producing witnesses and examining witnesses on the subject of the value under those circumstances.

However, we did not brief the point, because we assumed from the answer that it was admitted that the value of the plane was as set out in the policy, which is the exact words of the answer. I do not

want to introduce testimony on that point at this time, but I would [5] like to reserve the right in case it develops, which I don't think it will, that plaintiffs have the burden of going further on that item. Then I would like to reserve, if your Honor please, the right to introduce testimony on that point at a later time. Aside from that, we are ready to rest our case.

The Court: Is there any objection to this requested arrangement?

Mr. Wilkerson: If your Honor please, the original complaint alleged in Paragraph V that "On January 2, 1949, the aircraft above referred to crashed and burned in an attempted take-off at Boeing Field, King County, Washington, resulting in the complete destruction of such aircraft and of all equipment and accessories attached thereto and forming a part thereof, except for salvage from all of the foregoing to the value of \$390.20. The actual agreed value of the aircraft, as provided in the certificate above mentioned, was \$25,000.00."

There is no allegation anywhere in the complaint as to the value of the aircraft at the time of its loss. Our answer merely admitted that the value of the aircraft stated in the policy was \$25,000. The policy, of course, goes on to provide in Section B: "It is understood and agreed that Underwriters' liability under this Section in respect of any Aircraft shall not exceed the Agreed Value [6] including all equipment and accessories, as set forth in Column 8 of the Schedule, subject each and every claim in respect of Flight Risks to the

deductible applicable to each such Aircraft as set forth in Column 10 of the Schedule.”

We have no objection to counsel putting on this part of their case later, but we do not concede that they do not have the burden of showing as part of their case the value of the aircraft at the time of the crash.

The Court: I think you should do it now if it is not admitted.

Mr. Houghton: Your Honor, we did not come—as I say, the answer is not exactly as counsel suggests. The answer said: “admit that the actual and agreed value of said aircraft is as provided in said certificate of insurance.” For that reason, we did not come prepared to submit evidence on that, and we do not think we will have to take the Court’s time with such evidence, because we think that when the parties take out an insurance policy and have an agreed value right in the policy, that that is controlling or at least is *prima facie* evidence of the fact. This policy was taken out in July, five months before the accident, and they agreed right in the policy as to the value. It is an agreed value policy and we do not think we need to put on that kind of evidence, but [7] the only point—counsel said he would not have any objection to our doing it later. We did not want to hold up the trial on that item, because the probability is we will not put on evidence on it. We are going to brief it tonight. It was not called to our attention except since we have been in court counsel was denying what his answer says, so we have to check it and

decide whether we want to give evidence on it or not. We think we have made a *prima facie* case on it.

The Court: In view of that fact, do counsel for defendants object to the Court's saving to the plaintiffs the right to later put on evidence if they are so advised?

Mr. Wilkerson: We have no objection to that.

The Court: I understand subject to that right, the plaintiffs rest?

Mr. Houghton: Plaintiffs rest subject to that.

The Court: The defendants may now proceed with the defendants' case.

Mr. Matthews: May the record show that at this time the defendants challenge the sufficiency of the evidence and move for a dismissal of the plaintiffs' case. We think perhaps that motion should be made, although if it is agreeable we will not urge it because of the fact that other evidence may be introduced later on, but we do not want to be in the position of having waived anything. [8]

The Court: The Court will take it under advisement, with the effect that you may proceed with the defendants' case in chief. I wish you would remind me before the case is finally submitted on all sides that the Court has not finally ruled upon this motion.

Mr. Matthews: Defendant will call as its first witness Dorothy Sawyer.

DOROTHY SAWYER

called as a witness by and on behalf of defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Matthews:

Q. Will you state your name, please?

A. Dorothy Sawyer.

Q. Where do you reside?

A. 9741 - 41st Avenue S.W., Seattle.

(Weather Bureau records marked Defendants' Exhibit A-3 for identification.)

Q. What is your business?

A. I am now a housewife.

Q. What business were you engaged in on January 2, 1949?

A. I was a weather observer with the Weather Bureau.

Q. Where were you stationed on that day? [9]

A. At Boeing Field, Seattle.

Q. What hours were you working on that day?

A. I believe from 4 till midnight on January 2.

Q. Handing you what has been marked as Defendants' Exhibit A-3, will you state what that document is, if you know?

A. This is a copy of the airway weather observation chart from Boeing Field.

Q. For what date? A. January 2, 1949.

Q. Commencing at 0000.

(Testimony of Dorothy Sawyer.)

The Court: Will you interpret that in language that the layman understands?

The Witness: That would be 12 midnight.

Q. And it carries through until what hour?

A. The last observation is 2342, which would be 11:42 on January 2.

Q. 1949? A. 1949.

Q. There are a number of columns to this report, and the first column is called "Type." Can you tell us what that means?

A. Type is the kind of observation.

Q. Did you make the observations and the notations that appear on that report from the time you came on duty at 4 o'clock until the last observation which is recorded on that exhibit? [10]

A. All except the one at 4:25.

Q. Who made that one?

A. It is signed C.S., Charlotte Smidke, apparently.

Q. Do the initials D.S. in the last column on the right-hand side indicate—are those your initials?

A. Yes.

Q. Is that in your handwriting? A. Yes.

Mr. Matthews: I offer Exhibit A-3.

Mr. Cluck: No objection, your Honor.

The Court: Defendants' Exhibit A-3 is admitted.

(Defendants' Exhibit A-3 received in evidence.)

(Testimony of Dorothy Sawyer.)

DEFENDANTS' EXHIBIT A-3

United States of America
United States Department of Commerce
Weather Bureau

Date: September 18, 1950

Station: Weather Bureau Office, Seattle-Tacoma
Airport, Seattle 88, Wn.

As the custodian of the records of the U.S. Weather Bureau, filed at Boeing Field, Seattle 8, Washington, I hereby certify that the attached is a true copy therefrom.

/s/ HARRY A. DOWNS,
Official in Charge.

DATE Jan. 2, 1948

DATE _____

SURFACE WEATHER OBSERVATIONS

STATION-Salt Lake City, Utah.

[illegible]

admitted October 10, 1850.

(Testimony of Dorothy Sawyer.)

Q. Referring now to Exhibit A-3, the second column headed "Time," that indicates the time the observation was made? A. That is correct.

Q. And all of those time observations are in accordance with 0000; what do you call that method of keeping time?

A. That is 24-hour time.

Q. Starting at midnight, 0100 would be 1 o'clock in the morning? A. Yes.

Q. 1800 would be 6 o'clock in the evening?

A. Yes. [11]

Q. And 1200 would be 12 o'clock noon?

A. Yes.

Q. The next column shows the ceiling as it was observed at the Boeing Airport? A. Yes.

Q. And the next column marked "Visibility," does that show the official visibility as observed by you at the times indicated on this report?

A. Yes.

Q. The next column is headed "Weather and obstructions to vision." What does the letter F mean that appears in several places on that weather report? A. Fog.

Q. What does SW mean that appears several places? A. Snow showers.

Q. It started to snow at what time on January 2? A. At 1558.

Q. Will you give us that time the way we usually refer to it? It will be a little clearer for the record. A. 3:58 p.m.

(Testimony of Dorothy Sawyer.)

Q. How long did it continue to snow?

A. Until approximately 5 p.m.

Q. Does this report show how much snow fell during that time?

A. I believe the code figures at 1625 would give the [12] amount. I am sorry, I don't remember these code figures.

Q. Is Mr. Meredith who is here from the Weather Bureau familiar with those code figures? Could we get that information from him?

A. Yes, I believe so.

Q. The next column is headed "Sea level pressure." What does that indicate?

A. That is the atmospheric pressure in millibars, sea level pressure, reduced to sea level.

Q. And the temperature is shown in the next column? A. Yes.

Q. And the dew point is in the next column?

A. Yes.

Q. The next column shows the wind, which is broken down as to direction, speed, character and shifts, is that right? A. That is correct.

Q. The next column is headed "Altimeter set inches." What does that mean?

A. That is taken from the atmospheric pressure.

Q. Can you explain to us what you mean by an altimeter set?

A. I am afraid I can't any more.

Q. How long have you been away from this kind of work?

A. Oh, I would say about 20 months.

(Testimony of Dorothy Sawyer.)

Q. The column "Remarks and Supplemental coded data" were [13] the entries that are made opposite your initials—were those entries made by you? A. Yes, they were.

Q. I notice you have referred opposite what is marked as 2207, in parenthesis you have indicated aircraft accident. Did you make that entry?

A. Yes.

Q. To what accident did you refer?

A. To the crash of the plane bearing the Yale students back to school.

Q. The one we have been discussing here today?

A. Yes.

Q. Under remarks and supplemental coded data, you have the words "Ice xtals." What does that mean? A. Ice crystals.

Q. Can you explain what that means in language of the layman, what weather conditions that depicts or represents?

A. Well, with a fog condition and a temperature below zero, some of the particles of fog had frozen to form ice crystals in the air.

Q. You mean a temperature below zero, or below freezing?

A. Below freezing, I am sorry.

Q. In other words, do you mean by that—I don't want to lead you—that looking out into the atmosphere against a light you could see these ice crystals in the air, is that [14] what that entry means?

A. Yes.

(Testimony of Dorothy Sawyer.)

Q. Do you remember leaving the airport that night when you went off duty?

A. No, I can't say I remember it.

Q. Do you remember testifying at the CAB hearing in connection with the investigation of this accident?

Mr. Cluck: I object to that question and any other questions relating to what was testified at any CAB hearing. An express statute applies, which I might call the Court's attention to, to prohibit the introduction of any part of the evidence of any such hearing. That is 49 U.S.C.A. Sec. 581, which provides: "* * * no part of any report or reports of the former Air Safety Board or the Civil Aeronautics Board relating to any accident, or the investigation thereof, shall be admitted as evidence or used in any suit or action for damages growing out of any matter mentioned in such report or reports."

Mr. Matthews: This is obviously not the report of the Civil Aeronautics Board. You have been referring to it, Mr. Cluck, right along; you and Mr. Houghton were both referring to it on this gasoline business.

Mr. Cluck: I beg your pardon, but if you refer to the record, only with reference to the reason why you [15] may have made an error, not with reference to anything relevant to this proceeding. I want to preserve our objection, because the obvious purpose of the statute is to safeguard litigants so that any proceeding with reference to the

(Testimony of Dorothy Sawyer.)

proof of this or that event is to be on its own bottom in the proceeding itself and without reference to any prior Civil Aeronautics proceeding.

Mr. Matthews: I want to refresh this witness' recollection on the conditions that she observed concerning ice on the handrails and windshield of her automobile that evening around the airport, which was in the immediate vicinity of where this accident happened.

Mr. Cluck: You can ask her if she remembers that, without reference to the Civil Aeronautics Board.

The Court: I believe the objection should be sustained. It is so ordered.

Q. (By Mr. Matthews): Do you remember noticing the handrail out in front of the room where you did your observing on that night about the time of the accident? A. Yes, I believe I do.

Q. What was the condition?

A. It is a metal handrail, and it was icy. The steps are metal and they were icy and slippery, also.

Q. Do you remember any frost on the windshield of your car? [16]

A. I can't say that I remember it. I remember signing a statement that there was. I can't say that I remember now that there was at the time. I do remember signing the statement at the time that there was.

Mr. Cluck: If it will help you, counsel, we will so stipulate.

(Testimony of Dorothy Sawyer.)

Mr. Matthews: That is all.

Cross-Examination

By Mr. Cluck:

Q. From what point did you make your weather observations that evening? Where were you, in other words?

A. On the roof of the administration building at Boeing Field.

Q. You didn't make any observation from the north end of the runway looking south?

A. No.

Q. And so you wouldn't know what the visibility might be along the runway as seen by the pilot of an airplane at that time?

Mr. Wilkerson: If your Honor please, I object to that as being immaterial. Under the rules of the CAA the visibility reported from the tower is the only thing that is material. What the visibility may be from the end of the runway has no bearing on the issues of this case. [17]

Mr. Cluck: The answer to that is that we are not litigating rules of the CAA, we are litigating rules under an insurance policy, and the actual conditions on the runway as shown by adverse witnesses need to be pointed out and clarified, because even under counsel's own statement, that would be material to his proof of possible causes of this accident.

It is our position on this, by the way, that all

(Testimony of Dorothy Sawyer.)

evidence relating to alleged negligence is immaterial and irrelevant, and we shall submit authorities to the effect that in the absence of a very clear statement in the insurance policy itself excluding liability on that ground, that any insurer takes on the risk of the insured's being negligent. That is a general rule applicable to automobiles as well as airplanes, but here where the defendants have taken on the burden of showing that because of visibility and because of icing and because of overloading there was a breach of a particular covenant in the policy relating to manner of take-off by the pilot, then it becomes very material for us to carefully examine that proof and see whether it relates to the conditions that the pilot himself confronted at the point of take-off.

Mr. Wilkerson: If Your Honor please, we do not assume that the burden of proving these conditions—the burden [18] is at all times upon the plaintiff, of course, to show loss within the terms of the policy, which will be our position. Section 60.79 of the rules of the CAA defines ground visibility as “The average range of vision in the vicinity of an airport as reported by the United States Weather Bureau, or if unavailable, by an accredited observer.”

We have the weather report showing the visibility as being one-quarter mile. It is proper, no doubt, to ask where that is from, but what the visibility was at the end of the runway or some place else has no bearing on this case.

(Testimony of Dorothy Sawyer.)

The Court: The objection as made is overruled.

Q. (By Mr. Cluck): Your answer was no, you did not know what the condition was as to visibility from the north end of the runway looking south, is that correct? A. Yes.

Q. You recall, do you not, the conditions that night as far as weather is concerned were very variable? A. Yes.

Q. They changed every few minutes, is that correct? A. Yes.

Q. You spoke of the formation of frost on objects. Was it a case where precipitation in the air was freezing in crystalline form, is that [19] correct?

A. You mean the frost on exposed objects?

Q. Yes.

A. All I remember is, as I say, that the metal steps and handrails to the instrument shelter were icy and slick.

Q. What were you referring to when you made the notations in the report "ice crystals" that counsel referred to?

A. That is the freezing of the fog particles in the air.

Q. What were you looking at when you made the report? Did you just observe that there were ice crystals in the air generally, or did you have objects of one kind or another in mind when you made the observation?

A. I don't understand what you mean.

Q. What did you mean when you wrote "ice

(Testimony of Dorothy Sawyer.)

crystals" down several times in your weather report?

A. That I could see ice crystals in the air against lights.

Mr. Cluck: That is all.

Redirect Examination

By Mr. Matthews:

Q. And you observed those ice crystals from what time to what time? A. From 2146.

Q. Which would be what hour?

A. 9:46. The last observation they were carried on was 2218, which would be 10:18.

Q. Which was after the airplane crashed? [20]

A. Yes.

Q. And that condition of ice crystals suspended in the air existed continuously from the time you have mentioned? A. Yes.

Q. At 2127 you made an entry "visibility variable" and you do not make that same notation thereafter, but you indicate that visibility at 2146 was one-eighth mile and fog, is that correct?

A. Yes.

Q. And at 2158 it was one-eighth mile and fog?

A. Yes.

Q. And at 2204 it was one-quarter mile and fog?

A. Yes.

Q. At 2207, the time of the crash, it was one-quarter mile and fog? A. Yes.

Q. With these ice crystals suspended in the air?

(Testimony of Dorothy Sawyer.)

A. Yes.

Q. And that condition existed until 2218 when it was still one-quarter mile and fog? A. Yes.

Mr. Matthews: That is all.

Mr. Cluck: That is all.

The Court: Step down.

(Witness excused.) [21]

EDWARD MEREDITH

called as a witness by and on behalf of defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Matthews:

Q. Would you state your name?

A. Edward C. Meredith.

Q. Where do you live?

A. I live at 120 S.W. 164th Street, Seattle, Washington.

Q. Your business?

A. Supervising aviation forecaster for the U. S. Weather Bureau in Seattle.

Q. Were you occupying that position on January 2, 1949? A. I was.

Q. Do you remember the occasion of the crash of this aircraft that we have been talking about at Boeing Field? A. I do.

Q. Were you stationed at Boeing Field that night? A. Yes, sir.

(Testimony of Edward Meredith.)

Q. Where were you stationed?

A. On the second floor of the administration building, just under the tower.

Q. About how high off the ground is that?

A. 20 or 25 feet. [22]

Q. Handing you what has been marked Defendant's Exhibit A-3, I will ask you to state if you are familiar with that exhibit?

A. Yes, sir I am.

Q. Did you make any of the entries on this exhibit?

A. No, sir, they were all made on it by the official observer.

Q. You heard the testimony of the witness who just testified, Dorothy Sawyer, concerning the entries that are made on this report and what they mean?

A. Yes, sir.

Q. Have you anything to add to that, any corrections to make?

A. I have one point I would like to bring out, sir, that when the visibility is below three miles, the observations for visibility are actually transferred to the CAA tower operator and they are called to the Weather Bureau and entered as official records. The tower operators have passed examination on and are qualified as observers for visibility observations under those circumstances.

Q. Can you state whether or not this is a true copy of the official observations made by the Weather Bureau on the evening of January 2, 1949?

A. Yes, sir, it is.

Q. Those are made, you say, by qualified ob-

(Testimony of Edward Meredith.)

servers in [23] the tower who transmit the information onto this report?

A. No, sir. The visibility, when it is below three miles, is officially taken by the tower operator and is called to the weather observer over an interphone system at Boeing Field. It was an interphone system, and they are transcribed on this sheet in our office.

Q. Do you have a copy of this sheet in your office?

A. This is a copy reproduced by photostatic means of the original sheets that we still have at Boeing Field.

Q. And this represents the observations that were made in the tower, transmitted by telephone to Dorothy Sawyer and entered by her on your reports?

A. I couldn't say that for a fact, but I presume they are, because that is the regulation.

Q. That is the way it is usually done?

A. Yes, sir.

Q. How high is that tower off the ground?

A. My estimate would be about 50 feet.

Q. And it is located how close to runway No. 13, the north-south runway of Boeing Field?

A. I am not familiar with the distances on the field. Perhaps the tower operator could tell you more about that than I could.

Q. Can you tell us in this report how much snow fell on the afternoon or evening of January 2, 1949? [24]

(Testimony of Edward Meredith.)

A. I have an additional page of this record in my pocket that I referred to, and we had two-hundredths of an inch out of that snow shower.

Q. What was the temperature during that snow fall?

A. The temperature just before the shower, at our observation prior to the shower, was 39 degrees F.

Q. During what hours did the snow fall take place?

A. The first entry on this exhibit shows snow falling at 1558.

Q. Which would be what hour in standard time?

A. 3:58 in the afternoon.

Q. And it snowed continuously until what time?

A. Until 4:43 p.m., it was the last observation of snow. They issued a special at 1701, which is 5:01 p.m., eliminating the snow, so at 5 o'clock the snow storm was over.

Q. The temperature was slightly above freezing when it started to snow, was it not?

A. Yes, sir, 7 degrees.

Q. And the temperature did drop to 32 degrees shortly after it stopped snowing, is that right?

A. That is correct. The first observation we have after it was taken, with the temperature on it, after the snow shower, shows a temperature of 32 degrees.

Mr. Matthews: That is all. [25]

(Testimony of Edward Meredith.)

Cross-Examination

By Mr. Cluck:

Q. What was the ceiling at 2200 or thereabouts?

A. The official ceiling at 2204—there was no ceiling. There was no ceiling entered on the chart, on the form at all.

The Court: What does that mean so far as visibility is concerned?

The Witness: When you have—a ceiling is looking straight up, sir. If you can see the sky, the stars, the moon, then you have no ceiling, but a cloud layer will constitute a ceiling; for instance, clouds at 100 feet above the station.

The Court: Your statement that there was no ceiling means there was no ceiling to your eye, seeing as far as your eyes could see looking upward?

The Witness: That is correct.

Q. There were no obstructions from a cloud layer or otherwise looking upward, is that right?

A. They have what they call here—they have it entered as thin X, which means a thin obscuration. Exactly what that means is fog was drifting over the station, although they could see straight up so that they could distinguish objects straight up and in a cone-shaped circle vertically and they could see the stars and moon and some other heavenly body, so it was thin enough for that and they called it thin obscuration, which does not constitute a [26] ceiling.

Q. Was it or was it not part of your duties at

(Testimony of Edward Meredith.)

that time to furnish advice on weather conditions to pilots using Boeing Field? A. Yes, sir.

Q. You did do that? A. Yes, sir.

Q. They consulted you during the day?

A. Yes, sir.

Q. During the hours that you mentioned?

A. I happened to be on duty from 4 o'clock until midnight myself that day, or maybe it was 6 until 2, but I was on that evening.

Q. There were planes of various kinds, cargo, passenger planes, taking off from Boeing Field during those hours? A. Yes, there was.

Mr. Matthews: Objected to as improper cross-examination.

Mr. Cluck: It is proper cross-examination, we respectfully submit, because it is a phase of his general duties in his capacity as affiliate with the Weather Bureau concerning which you inquired, although it is not a particular phase which was covered. I think it is proper as showing what he was doing in reference not only to his weather observations, but transmittal of his observations to the people he was under a duty to furnish.

Mr. Matthews: I object about other planes taking [27] off at other times. They might have taken off under advice or not. Ther regular airlines have different standards of minimums for take-off than non-scheduled carriers.

The Court: If the time was related to the time of this attempted departure, that might answer the objection, but I do not see that qualification of the question. The objection is sustained.

(Testimony of Edward Meredith.)

Mr. Cluck: That is all.

The Court: The answer is stricken.

Redirect Examination

By Mr. Matthews:

Q. You were there at the time of the crash?

A. Yes, sir.

Q. Did you hear the airplane in which these Yale boys were riding go by your observation room?

A. Yes, sir.

Q. Could you see the airplane itself as it went by?

A. No, I was working over away from the windows so I didn't see it until after it crashed.

Q. At the time the airplane took off, could you see the runway lights that were out in front of your observation room?

A. I was paying no attention to the observations. I was working on forecasts and the observer was taking the observations. [28]

Q. You didn't look?

A. Of my own knowledge, I don't know.

Q. Did you make any observations yourself as to visibility at the time of the take-off?

A. No.

Mr. Matthews: That is all.

Mr. Cluck: That is all.

The Court: Step down.

(Witness excused.)

ROBERT WILEY

called as a witness by and on behalf of defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Matthews:

Mr. Matthews: Your Honor, the last witness expressed a desire to be excused as soon as possible. We do not care to detain him, unless counsel does.

Mr. Cluck: No objection.

The Court: You are excused, Mr. Meredith.

Q. Will you state your name?

A. Robert H. Wiley, 5103 Adams Street, Seattle 8.

Q. What is your business?

A. Airport traffic controller, stationed at [29] Seattle-Tacoma Airport at the present time.

Q. Did you occupy that position on January 2, 1949?

A. Yes, sir.

Q. What are your duties as airport traffic controller?

A. Well, to sum it up briefly, it is to expedite the flow of traffic in the air around the airport, landing and taking off, as well as keeping a visual eye on all aircraft, trucks, vehicular traffic on the airport that might be a hazard to any moving aircraft landing or taking off, and to coordinate with the Weather Bureau and other agencies involved in expediting the flow of traffic.

Q. Do you make any weather observations?

(Testimony of Robert Wiley.)

A. We make all weather observations when the visibility is three miles or less than three miles. That is visibility only, not ceiling.

The Court: You say "we" in answer to the question. Would you try to relate your answer in terms that are absolutely responsive?

Q. Would the reporter read the last question, please?

(Last question read by reporter.)

A. I do make weather observations.

Q. Were you on duty at the time of the crash of the airplane in which these Yale boys were killed and injured?

A. Yes, sir.

Q. Do you know what the official record of [30] visibility was at Boeing Field on January 2, 1949, at the time this aircraft took off?

A. Well, according to the Weather Bureau reports, this copy that I have here, one-quarter of a mile clear and one-quarter. However, I could not state definitely whether I took that observation personally or not. There was one other man on duty with me who was also qualified to take that responsibility. I would have to look at the record and see whose initials are on it. I was in charge of the shift. It was my responsibility to see that whatever his observation was done correctly. However, I might not have initialed the contact at the time.

Q. Do you have any opinion as to whether or not the official forecast of visibility as shown upon Defendant's Exhibit A-3 is or is not the correct

(Testimony of Robert Wiley.)

and official record of visibility at the time this plane crashed?

A. I am not sure that I understood that question. However, I believe that the Weather Bureau record as shown here in the testimony is correct as to that matter.

Q. Do you have Exhibit A-3 in front of you?

A. No, I do not now. The time here involved was approximately 2207, is that correct, 10:07 p.m.?

Q. That is the entry that is made opposite 2207. It says aircraft accident.

A. Yes. One-quarter mile, that is correct, [31] yes.

The Court: That relates to visibility?

The Witness: That is visibility, yes, sir. As Meredith stated, there wasn't any ceiling. We had thin obscuration at the time, and that was explained.

Q. On January 2, 1949, how long had you been working down there at the airport?

A. I went to work for the CAA at Boeing Field, at Boeing Tower, on March 1, 1943. I have been there continuously from that time until the time of the accident.

Q. During that period of time, have you had opportunity to hear a good many planes take off?

A. Definitely, yes, sir.

Q. Have you had any flying experience yourself?

A. Yes, I hold a pilot's license.

Q. How many hours?

A. Approximately 400 hours, with probably pretty close to 100 hours of Link time, which does

(Testimony of Robert Wiley.)

not mean a great deal except it is simulated instrument time.

Q. Did you hear these motors when they were what they call revved up or run up prior to the take-off? A. Yes, sir, very distinctly.

Q. Will you describe how they sounded to you with respect to whether they sounded normal?

A. As I recall it, the aircraft had been cleared into position sometime prior to his take-off, due to the fact that [32] he was the only active aircraft on the field at the time or in the air. He was sitting on the end of the runway and when he finally received his clearance for take-off——

Q. Just describe the sound of the motors.

A. He revved up one engine and then he revved up the other. They both appeared, as far as I could tell, absolutely normal, and we even commented in the tower at the time, the other boy that was on with me, that we could tell when he started his take-off run by the way the power was being applied. You could hear the aircraft approachnig what would be almost the center of the field if he was over the runway. However, as it turned out, he wasn't over the runway; he was nearer to me than he was to the runway when I picked him up, but everything sounded absolutely normal.

Q. Could you see the airplane when it was revving up its motors? A. No.

Q. About how many feet away from you was the airplane at that time?

(Testimony of Robert Wiley.)

A. I would say 2100 feet would be a good average, north of me.

Q. You have described the sound of the motors as they were warming up. How did the motors sound during the take-off? A. As normal.

Q. Did you notice anything unusual about them at all? [33]

A. Nothing unusual at all, very even and normal.

Q. Power seemed to be applied evenly?

A. Yes, sir.

Q. Motors seemed to be synchronized evenly?

A. As far as I could tell, yes, sir.

Mr. Matthews: That is all.

Cross-Examination

By Mr. Cluck:

Q. Do you recall seeing low ground fog on the field that evening? A. Yes, sir.

Q. The depth in feet would vary depending on the place on the field, is that correct?

A. Very definitely that night, yes.

Q. It was variable from minutes to minutes?

A. Very variable.

Q. And you don't know what the visibility was looking down the runway south from a position at the north end of it, do you?

A. No, I would have no way of knowing that.

Q. In the course of your performance of duties there, have you found it unusual that a pilot could see the full length of the runway whereas you in the tower could see only a limited distance?

(Testimony of Robert Wiley.)

Mr. Matthews: Objected to as incompetent, irrelevant [34] and immaterial, argumentative.

The Witness: Would you read the question, please?

(Last question read by reporter.)

The Witness: No. I have had occasions where the pilot has told me that he could see the full length.

Mr. Matthews: I object to what some pilot told him.

The Court: I think the answer should remain as "no." The objection is sustained to the addition of the explanation.

Mr. Cluck: May I make sure the witness understood the question?

Q. (By Mr. Cluck): When you said no, Mr. Wiley, did you mean to say that it wasn't unusual that the visibility of the pilot could differ from the one in the tower? A. That is correct.

Mr. Matthews: Objected to as improper cross-examination.

The Court: The objection is overruled.

Q. In other words, the witness says, no, but actually as is clear, meant yes?

A. What I meant to say was that there are times when the pilot, I believe, can from his point of view see the full length of the runway whereas we are unable to, especially at Boeing Field.

Q. When you said "especially at Boeing Field," did you have some unusual conditions in mind at

(Testimony of Robert Wiley.)

that field that [35] might distinguish it from others?

A. Well, I think so. This isn't official, it is only my own thought on the deal. We are kind of down in a cup there where the fog drifts over one hill and drifts up over another one. You are not on a flat plane where the wind can pick it up and blow it over an extended area.

Q. Are you in charge of maintaining communication with pilots taxiing up to the point of take-off on a runway?

A. The pilot is required by Civil Air regulations, the minute he starts his engines, he is to contact the tower, no matter whether he taxis or where he is going. If he is going to be anywhere near a taxiing area, landing or taking off area, they are to contact us before they move the airplane.

Q. Did you have such contact with pilot Chavers in the subject aircraft on the evening of January 2?

Mr. Matthews: Objected to as improper cross-examination, unless he wants to make this man his own witness.

Mr. Cluck: This is preliminary, Your Honor, but counsel covered the matter of weather observation presumably as it might bear upon the matter of take-off. He did not supply the detail with respect to this witness' communication with the actual pilot who was taking off. It seems to me that is a part of the general subject matter concerning which there was inquiry on direct.

(Testimony of Robert Wiley.)

The Court: The objection to the question asked is [36] sustained with leave to ask the witness if he was told by this pilot anything about the visibility.

Q. Were you told by pilot Chavers anything about the visibility at the north end of the runway?

Mr. Matthews: I object to that as hearsay.

The Court: Is there any response to the hearsay objection?

Mr. Cluck: Yes, Your Honor. This is a matter of regular procedure of clearance of the aircraft. It is verbal actions which are taking place between the pilot of the aircraft and the witness. It is the means by which he gets some of his observations, and it is the means by which his data is communicated with pilots, a regular part of clearance procedure as he has testified.

Mr. Matthews: We have had no opportunity to cross-examine a witness that made such claim. If counsel has any witness that was at the north end of the field that would so testify, that would be one thing, but to permit testimony of a statement made such as this, would seem to me certainly is clearly hearsay.

The Court: Is there any agency in a matter of this sort which would cause an exception of the hearsay to apply?

Mr. Cluck: There isn't any agency, no, Your Honor, but this question is simply part of a general subject [37] matter of what occurs between the tower and the pilots. I might say this is a rather

(Testimony of Robert Wiley.)

unusual situation in the respect that concededly the CAA and regular operating procedures of aircraft require communication back and forth between tower and pilot as part of the official procedure by which aircraft take off, and we feel it therefore comes within the hearsay exception in the respect that he indicated this pilot was taking off on the night in question and was complying with the applicable procedures, and it should be pertinent to see just what passed between the tower observer in charge, in official charge of that procedure and the pilot who was taking off in accordance with it.

The Court: Mr. Matthews, I am inclined to think that the fact as to whether or not any communications were conducted between the pilot and—have you anything else to respond to the last suggestion that communication may be shown under the circumstances?

Mr. Matthews: I am not aware, Your Honor, of any such rule as counsel mentions, that simply because it might be customary when one man went off duty at night to talk to the janitor or have a conversation with any number of people—it certainly seems to me to be hearsay to permit testimony of some statement made by a witness that we have no opportunity to cross-examine. [38]

The Court: I am more inclined to sustain the objection because it is a result of the Court's unsolicited suggestion than anything else. If it should be erroneous, it being a matter which the Court suggested with being requested to do it, I would

(Testimony of Robert Wiley.)

have more concern about it, and I think for that reason more than any other the Court will sustain the objection. You may proceed.

Q. (By Mr. Cluck): Mr. Wiley, you stated, I understand, it is part of your duties to give taxi directions to pilots on the field? A. Yes, sir.

Q. Did you give such directions to pilot Chavers on the evening of the take-off?

A. I gave him such instructions, to NC 79025.

Q. Were you acquainted with pilot Chavers?

A. I had met the man in the tower on official business, as a routine pilot coming up to the tower. I did not know him personally, just to speak to him in the hall and call him by name, but that's all. I had other contacts with him several times.

Q. But you were in regular touch with the pilot of this aircraft in the course of its taxiing to the end of the runway and immediately prior to take-off, is that correct? A. Yes.

Q. Could you refer simply to refresh your memory to any [39] notes you may have taken and tell us what occurred? Let me ask you, did you take notes on what occurred at that time as far as your giving taxi clearance with the pilot of this aircraft?

A. We have an electrical recording machine that is attached to our microphone relay system, and everything that the tower operator says, regardless of who it is or who it is to or what frequency it is on, it is automatically transcribed at the instant

(Testimony of Robert Wiley.)

it is put on the air. All we have to do is play the record back, and if it's all there, it's there; if it isn't that's it.

Q. Did you cause that to be transcribed as far as the record applicable to this airplane is concerned?

A. Yes, sir, I did.

Q. Did you make any notes with respect to answers to your directions received from the pilot?

Mr. Matthews: Objected to. I think now he is trying to circumvent the Court's ruling. As far as the statements, self-serving statements made by the pilot, I think they are clearly hearsay and objectionable on that ground.

Mr. Cluck: I might add this word. I think there is a little confusion in counsel's application of the hearsay rule, and I will just illustrate it in this way. If we were to describe an Army movement, it would be pertinent to recite what the orders were of the captain [40] to whoever it was they were given, not because they are cited necessarily for the truth of the matter asserted, as it is a part of the procedure of the movement. Likewise, here these directions are an official part of the take-off procedure, and a necessary part of the procedure also are the replies. One direction is dependent upon the reply received from the preceding one, so that it is offered as a description of the official take-off procedure within the direct meaning of this witness, and that is the purpose of a number of these questions that relate to that same subject matter.

(Testimony of Robert Wiley.)

Mr. Matthews: The take-off procedure can be described, and I think has been described, without bringing in hearsay statements of witnesses on a material point in this case which we are helpless to cross-examine.

The Court: Your objection to what the pilot may have said and what this witness may have recorded at the time may be based on two different things. This question may be asked and you may see later whether or not you object to any further questions. Read the question.

(Last question read by reporter.)

A. Yes.

Q. Will you refer to the notes that you have taken concerning the official taxiing procedure and tell us exactly what occurred as you remember? [41]

Mr. Matthews: That is the same objection, if he is attempting to read any other than statements he made. I haven't any objection to any statement he may have made, but as to statements made by the pilot, I think that is definitely hearsay.

Mr. Cluck: The confusion arises from the point that this is a matter which is submitted not necessarily for the truth of any factual matters asserted by the pilot, but as a regular part of the official taxiing and take-off procedure.

The Court: What do you seek to prove by this line of inquiry and what makes it material and admissible?

Mr. Cluck: What we are seeking to show, your

(Testimony of Robert Wiley.)

Honor, is exactly what occurred as far as the transmittal of weather information and procedure of taxiing and clearing the airplane for take-off.

The Court: Why do you not ask him about the weather? You have already done that, but if there is anything else about the weather you wish to ask this witness about, you had better get at that. I am going to sustain the objection unless you confine the questions to him as to what was then done or recorded from oral statements, unless you confine your questions to what he said or did, this particular witness. Ask him about the weather, if he observed anything about the weather. [42]

Mr. Cluck: We might still, your Honor, to comply with the Court's direction, we can make an offer of proof later as to what the pilot said or did. May we ask the witness to give us the sequence of what occurred as far as the tower directions or statements to the pilot?

The Court: How long will that take?

Mr. Cluck: Only about ten minutes.

The Court: Court will be adjourned until tomorrow morning at 9:30.

(At 5:15 o'clock p.m., Tuesday, October 10, 1950, proceedings adjourned until 9:30 o'clock a.m. Wednesday, October 11, 1950.)

(Testimony of Robert Wiley.)

October 11, 1950, 9:30 A.M.

The Court: You may proceed in the case on trial.

Q. Mr. Wiley, what other transport aircraft, if any, took off from Boeing Field within a period of approximately half an hour prior to the accident in question?

Mr. Matthews: Objected to as incompetent, irrelevant and immaterial to any of the issues in this case.

The Court: Will you state the purpose of the question?

Mr. Chuck: Yes, if your Honor please. The matter upon which defendants rely principally as a basis of [43] voiding liability on their policy are conditions of take-off at Boeing Field. Testimony has been introduced by the defendants as a part of their direct examination relating to weather minimums, including visibility, particularly frost or icing conditions, and so on. We expect to show by this witness very briefly that during the period covered by such direct examination several scheduled and non-scheduled transport aircraft took off from this same runway, at the north end of it, and it seems to us that is a part of the evidence going to show the actual flight conditions on that runway. The presumption would be that aircraft, particularly scheduled air line aircraft, would be observing the law or otherwise would be conforming with safety standards, and it is just a part of the evi-

(Testimony of Robert Wiley.)

dence which the Court can hear and evaluate for what it thinks it is worth after hearing the whole case.

Mr. Matthews: If the Court please, that would require us to go into the condition of the weather at the time these other airplanes took off. It has already been testified to that weather conditions were extremely variable; that one moment visibility would be one thing, the next minute visibility would be something else. The fact that some other transport pilot did or did not abide by the rules and regulations of CAA doesn't mean a thing. [44] Some other non-scheduled carrier might have also violated these rules. It seems to me we should confine our inquiry here to the conditions of this airplane at the time it took off, the conditions of weather and visibility at the time this airplane took off, not as to conditions at other times when other airplanes took off.

The Court: The Court believes that the conditions of flight as affecting safety of take-off of the plane in question at or about the time it attempted to take-off are material, and as to whether or not some particular is more remote than some particular testified to surrounding and affecting the attempted take-off of the plane in question, that is a matter of weight rather than admissibility, and the Court overrules the objection. Read the question.

(Last question read by reporter as follows:

“Q. Mr. Wiley, what other transport aircraft,

(Testimony of Robert Wiley.)

if any, took off from Boeing Field within a period of approximately half an hour prior to the accident in question?")

A. According to my notes here——

The Court: I do not believe you are authorized to read into the record your notes. You should answer the question if you can.

Q. You may refresh your recollection, if I may interpose.

Mr. Matthews: Your Honor, the notes he has is testimony [45] before the CAB, and counsel objected successfully to my even letting the weather woman refresh her recollection. I think under the circumstances, if we are going to apply the same rule, it should be applied to this witness. That is the testimony, wasn't it, that you prepared and gave before the CAA?

The Witness: Yes, sir.

Mr. Cluck: If the Court please, the notes that I am referring to were those taken as a regular part of the procedure, irrespective of CAB hearings. The witness testified yesterday that a recording is kept showing the data with reference to take-off reports on the departures, and he has other data in the tower, and I am asking him not to testify on the basis of what his notes say, but on the basis of what his recollection is, using notes simply as the basis of refreshing his memory.

The Court: There is a lack of clarification. The witness has answered a question by Mr. Matthews

(Testimony of Robert Wiley.)

that the notes to which he actually refers in response to inquiring counsel's advising him that he may refer to something, is the testimony that he gave before the CAB or CAA. In view of that record, I say that the objection is well taken and is sustained. It does not prevent his referring to official notes. The Court's ruling does not relate to possible notes made by this witness in the [46] course of his work at the time the work was done by this witness.

Mr. Cluck: In deference to the Court's ruling, we will defer further questions of this witness until we have had an opportunity of checking further on the notes. No further questions.

Mr. Matthews: No questions.

The Court: The witness is excused from the stand. Does either side ask to reserve the right to recall the witness?

Mr. Cluck: Yes, we do, your Honor.

The Court: The witness will remain in attendance until later excused.

KENNETH BUZZELL

called as a witness by and on behalf of defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Matthews:

Q. Will you state your name, please?

A. Kenneth Buzzell.

(Testimony of Kenneth Buzzell.)

Q. Where do you live?

A. 12436 20th South.

Q. What is your occupation? [47]

A. Mechanic, aircraft mechanic.

Q. How long have you been engaged in that business? A. Ten years.

Q. By whom are you employed?

A. West Coast Airlines.

Q. Where are you stationed?

A. Boeing Field.

Q. How long have you been stationed at Boeing Field? A. Five years.

Q. How long have you been with West Coast?

A. Three and a half years.

Q. By whom were you employed prior to that?

A. Northwest Airlines.

Q. Stationed where?

A. At what time, sir?

Q. Well, just generally during the time you worked for them, just briefly. Was it here in Seattle? A. Part of the time.

Q. About how long here at Seattle?

A. A year and a half.

Q. What certificate or rating do you hold as an airplane mechanic? A. An A and E license.

Q. What do you mean by an A and E license?

A. Aircraft and engine. [48]

Q. Who issues that license to you?

A. CAA.

Q. What have been your duties with these airlines that you have referred to?

(Testimony of Kenneth Buzzell.)

A. They haven't been all of one nature. They have varied some.

The Court: Can you tell what some of the duties were? A. Yes, sir. Line maintenance.

The Court: By "line," what do you mean?

A. Line maintenance in connection with aircraft has to do with arrival and departure of aircraft.

The Court: What significance does that word line have to you?

A. It means ramp procedures, ramp and periodic checks, and it is aside from overhaul.

Q. During the time that you have been stationed down at Boeing Field, have you been working at a position where you could hear the sound of airplane engines when they took off for flight?

A. Yes, we hear them every day.

Q. How close is your shop located to the runway?

A. The same distance as would be from the tower to the runway.

Q. Can you hear quite clearly the sound of airplane motors as they take off on the runway going north and south? [49]

A. Yes.

Q. Do the airplanes in such a take-off pass right by your shop? A. They pass by, yes.

Q. About how far is your shop from the east edge of the runway, if you know?

A. Mr. Wiley I think could tell closer.

Q. Anyway, it is close enough that you can hear clearly the sound of motors as they take off?

(Testimony of Kenneth Buzzell.)

A. Yes.

Q. Were you stationed at your job with the West Coast Airlines on the night of January 2, 1949?

A. Yes, sir.

Q. State whether or not you heard the airplane in which these Yale boys took off, this Douglas DC-3 No. NC 79025, rev up its engines and take off?

A. You could hear it very clearly.

Q. Were you inside your shop or outside the shop when you were listening to these motors?

A. Inside the shop while they were at the north end prior to take-off, and outside the shop the time of take-off.

Q. Why did you happen to go outside the shop at the time of take-off?

A. To watch the take-off.

Q. Was there any particular reason why you were interested [50] in this take-off?

A. Yes.

Q. What was that reason?

A. Take-offs at Boeing Field in——

The Court: Do not go off into that discussion. Just answer the question directly.

A. Marginal weather.

Q. Could you see when you went out to the outside of your shop, could you see the north end of the runway?

A. No.

Q. Could you see the airplane to which I referred at the north end of the runway?

A. No.

Q. Could you see the south end of the runway?

A. I don't know, sir.

(Testimony of Kenneth Buzzell.)

Q. Was there anything unusual about the sound of the motors while they were revving up or during the take-off? A. Not that I could tell, no.

Q. Did it appear to you that the power was being applied evenly and uniformly?

A. It seemed so.

Q. As far as the performance of the motors is concerned, was there anything abnormal or unusual about what you heard or saw?

A. No, nothing. [51]

Q. Do you know what the condition of the ground was with respect to whether there was snow and ice on the ground at this time?

A. Yes, sir.

Q. What was that condition?

A. It was icy.

Q. Any snow?

A. No, I don't remember, sir.

Mr. Matthews: That is all.

Cross-Examination

By Mr. Cluck:

Q. As I understood your background, you have not had any experience in observing weather in a professional way at all, have you?

A. How do you mean, professional?

Q. You haven't served as any weather observer?

A. No, sir.

Q. The judgments that you expressed with respect to behavior of engines was based solely on the sounds that you heard, is that correct?

(Testimony of Kenneth Buzzell.)

A. That is correct.

Mr. Cluck: That is all.

Redirect Examination

By Mr. Matthews:

Q. Have you had any flight experience? [52]

A. Some.

Q. Do you hold a license of any type as a pilot?

A. Yes.

Mr. Matthews: That is all.

The Court: Step down. Call the next witness.

EMMETT FLOOD

called as a witness by and on behalf of defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Matthews:

Q. Will you state your name, please?

A. Emmett G. Flood, Jr.

Q. What is your business?

A. I am an airline captain.

Q. What training and experience have you had in the flying of airplanes?

A. Well, I have got a total of 6,500 hours. I hold an airline transport rating, 1050 h.p. to 12,000 h.p.

Q. Of that 6,500 hours, how much of that has been in multiple engine planes?

(Testimony of Emmett Flood.)

A. I would say approximately 6,000 hours.

Q. Have you had any experience flying under icing conditions?

A. I flew in the Alaska Territory for a period of three [53] years. I have a thousand hours of actual instrument time, icing and so forth.

Q. Three years in Alaska, you say?

A. Yes, sir.

Q. Were you at Boeing Field on the night of January 2, 1949, the occasion when the Douglas DC-3 No. 79025 attempted to take off on runway No. 13?

A. I wasn't there at the time of take-off. I had refused to fly the airplane and went home at approximately 1930.

Mr. Cluck: Your Honor, I object to this testimony. I suggest that the witness answer the question instead of volunteering information.

The Court: Try to make your answers responsive to the question and do not make any additional remarks not called for by the question.

Q. How did you happen to go to the airport that night?

A. I was called by Mr. Leland to take the flight.

Q. That is Mr. William F. Leland?

A. That is correct, sir.

Q. You were called by him?

A. Yes, sir.

The Court: To take the flight?

A. To take the flight, yes, sir.

The Court: You mean by that what? [54]

(Testimony of Emmett Flood.)

A. As a member of the flight crew. It wasn't clear to me just what member, they called me up at the last minute. I didn't work for the company before. The company for which I was employed at Boeing Field quit business on December 27, and they called me. I had nothing to do with the company before.

Q. What time did you say you arrived at the airport? A. At approximately 1900.

The Court: Would you say by ordinary clock what time that was?

The Witness: 7 p.m., sir.

The Court: If you can, in speaking of time I wish you would use the ordinary terminology of time familiar to laymen.

The Witness: Yes, sir.

Q. Did you see this aircraft at that time?

A. Yes, sir, I did.

Q. What was its condition?

A. It had an accumulation of ice, frozen slush, on both wings, both on the top surface and the under surface of the wings. The top of the fuselage, I noticed, from a point five feet from the front to the tail had approximately four to five inches of snow on.

Q. What was the condition of the underneath side of the wings? [55]

A. Well, it looked to me like in the attempt to wash the wings, with cold water, which the mechanic told me he did, that the water had—it

(Testimony of Emmett Flood.)

seeped over, I mean just froze on the underpart of the wings.

Q. Had it frozen in a smooth manner, or otherwise?

A. No, I noticed a few icicles dripping water. The temperature was 22 that night, I think, and you could see that water was applied to the aircraft. I noticed icicles on the underpart of the wing, various places.

Q. Did you have any discussion with anyone about the condition of the plane, and particularly as to whether or not it was in any condition to be flown?

A. Mr. Chavers asked me to inspect the airplane when I came to the airport.

Mr. Cluck: Your Honor, I object to this as being hearsay.

The Court: Mr. Chavers, that is one of the pilots?

Mr. Matthews: Yes, your Honor.

The Court: As I recall, yesterday on cross-examination objections to inquiries as to what the pilot said were sustained.

Mr. Matthews: I will withdraw the question, your Honor.

Q. Did you make any statement to either Mr. Jandl or Mr. Leland or Mr. Chavers concerning the condition of the airplane with respect to whether or not it was in a safe [56] condition to be flown? Answer yes or no.

Mr. Cluck: I object to that, your Honor, as

(Testimony of Emmett Flood.)

being immaterial and irrelevant, what this witness said to the other parties, if he did say anything. That, by the way, is at 7 o'clock or thereabouts in the evening as far as the testimony so far is concerned.

The Court: The hour of attempted departure was what?

Mr. Cluck: 10:07.

The Court: Read the question.

(Last question read by reporter.)

The Witness: Yes.

The Court: That may be answered and the answer will remain, but as to whether or not he may be asked to now relate what the statement was, if the objection goes to that I will hear the objection.

Q. What statement did you make to Mr.—don't answer until the Court rules—what statement did you make to Mr. Jandl, Mr. Chavers or Mr. Leland?

Mr. Cluck: I object to that question. If the witness is able to tell the Court what conditions he observed a reasonable time prior to take-off, that, of course, would be relevant. So far the witness has testified only he was down at the field three hours and some odd minutes prior to take-off, a circumstance which has not yet been connected with conditions at the time of departure, and [57] then he is asked about remarks he may have made as to conditions then present.

The Court: Statements made about the condition of the plane so far as affecting its safe de-

(Testimony of Emmett Flood.)

parture, safe take-off, if made to Mr. Leland would seem to me not to be subject to the hearsay rule objection. I ask counsel inquiring if he intends to connect up the condition of the plane at the time this witness is asked to speak with the condition of the plane at the time of take-off.

Mr. Matthews: Yes, your Honor, I do.

The Court: Mr. Cluck, do you wish to pursue your objection in view of counsel's promise?

Mr. Cluck: We wish to preserve our objection, your Honor, for the reasons indicated; that what this witness may have said either to Mr. Leland or to anyone else three hours and some odd minutes prior to take-off does not have a bearing either on conditions prior to take-off or on any actions which Mr. Leland or anyone else may have taken with reference thereto.

The Court: The Court rules that with reference to the statements made by this witness to Mr. Leland at the time in question, he may make answer to this question, but that he cannot in answer to this question relate any statement made by the witness to the pilot Chavers.

Q. Just answer this question yes or no. Did you have [58] a conversation with Mr. Leland concerning the ice and frost on this airplane?

A. Yes, I did.

The Court: Let him have an opportunity in this connection to say when he had that conversation.

Q. When did you have that conversation?

A. At approximately 7:15 p.m.

(Testimony of Emmett Flood.)

Q. Will you state what that conversation was?

A. I told Mr. Leland we needed at least 25 gallons of alcohol and I would make an attempt to remove the ice with that alcohol. I didn't know if that would be enough or not.

Q. State whether or not you expressed to Mr. Leland any opinion as to whether or not the airplane in the condition in which you saw it at that time was in a safe condition to take off?

A. I told Mr. Leland it was not in a safe condition to take off.

Q. What did he say to you?

A. He said——

Mr. Chuck: I object to that, your Honor, as being hearsay and immaterial.

The Court: The objection is overruled; I think you should ask him what if anything.

Q. What if anything did he say to you in response to your statement you just referred to? [59]

A. He said, "This is a hell of a time to pull that."

Q. State whether or not Mr. Leland made any statement to you as to his opinion as to whether or not the airplane was safe to take off? Answer yes or no.

A. Say that again, please.

(Last question read by reporter.)

A. Yes.

Q. What was that statement?

A. He said—he rubbed his hand on the wing

(Testimony of Emmett Flood.)

and he said, "It don't look like too much ice to me."

Q. What did you do then?

A. At that time I went up in the cockpit and got my bags and left the airport, went home.

Q. When you got home, state whether or not you called on the telephone anybody connected with the CAA?

A. I called Mr. Mugge, advised him of the discussion that we had at the airport, why I left the airport, and told him I didn't consider the airplane safe for flight.

Mr. Matthews: You may inquire.

Cross-Examination

By Mr. Cluck:

Q. What time did you leave the airport?

A. Around 7:30 p.m.

Q. You knew nothing concerning anything which may have been done to the plane in the way of ice removal after that [60] time?

A. That's right.

Q. You spoke of your request for 25 gallons of alcohol. What kind of alcohol were you referring to?

A. The ordinary alcohol that we use in our propellers, on our windshields to remove ice.

Q. Did you mention the temperature at the time that you were down at the airport? I wasn't too sure.

A. I think, sir, it was 22 degrees, if I remember correctly. I don't remember.

(Testimony of Emmett Flood.)

Q. Did you have occasion to make any observation of that yourself, or are you just testifying by way of estimate?

A. I think on the way to the airport I heard a radio announcer give the temperature at Seattle that evening. That is how I knew it.

Q. What was the extent of your inspection of the ice on the underside of the wings as of 7 o'clock approximately?

A. Well, I inspected the complete aircraft, the under surfaces of the wings, the elevators, the ailerons. I tried to move the ailerons and there was so much frozen slush that I could just about move them. I checked the top of the wings with a flashlight and the under surface of the wings with a flashlight.

Q. What did you find on the top side of the wings?

A. An accumulation of frozen slush, where snow had been [61] removed with water.

Q. Frost, too?

A. No, it was just a frozen slush condition over the entire surface of the tops of the wings.

Q. Then what did you do with the underside?

A. I inspected with a flashlight, noticed there was a frost accumulation where water had dripped over, or sprayed and froze in the attempt to wash it. I figured probably the spray from the hose that Mr. Miner used froze on the under surface of the wings. That is what it looked like to me.

(Testimony of Emmett Flood.)

Q. It was a situation you observed of small frost icicles you mentioned?

Mr. Cluck: That is all.

Redirect Examination

By Mr. Matthews:

Q. You said you had had some three years experience flying in Alaska. Have you ever had any experience of attempting to take an airplane off the ground with frost on the wings? A. Yes, sir.

Q. Where did that occur?

A. Approximately thirty days before this incident took place, at Annette Island, Alaska.

Mr. Cluck: Your Honor, I object to this line of inquiry. It is an inquiry apparently directed to relating the circumstances of some undisclosed accident of one [62] kind or another up at Annette, Alaska. What bearing it has in connection with anything so far brought out is certainly far from clear, and it opens up a pretty wide field of inquiry as far as the actual issues of the case are concerned.

Mr. Matthews: The purpose of the question, your Honor, is to show by this witness that he has personally attempted to take an airplane off the ground with much less accumulation of frost on the wing than this airplane had, and I want him to tell what happened to that airplane and ask him his opinion as to that effect of frost on the wing of the airplane, but before asking the effect, I want to

(Testimony of Emmett Flood.)

show his qualifications and experience in that connection.

The Court: The objection is sustained with reference to the details as to the experience. The general question asked, and I believe he has already answered it, as to whether he had any such experience, will stand, but the objection made will be and is sustained.

Q. Mr. Flood, can you explain to us the effect that an accumulation of frost and ice on the wings has upon the lifting qualities and characteristics of an airplane?

A. It completely destroys the lift characteristics.

Q. What effect if any does it have upon the stalling speed of an airplane?

A. Well, it causes your wing to stall out. It just [63] won't fly, build up speed. I mean it creates a stall, in other words, which is very, very dangerous in take-off.

Q. State whether or not an accumulation of frost on a wing is more dangerous during take-off than it would be in flight?

A. Well, it probably wouldn't form on that part of the wing in flight. It is a ground condition. You will get ice on the leading edges of the wings or propellers, and so forth, but on the top surface of the wing or under surface it won't form in flight. It was a ground condition.

Mr. Matthews: That is all.

(Testimony of Emmett Flood.)

Recross-Examination

By Mr. Cluck:

Q. You made the statement that frost, or frost and ice, whatever it is you are referring to, completely destroys lift characteristics. What the effect is as to in relation to lift characteristics depends upon the amount and nature of an accumulation in a particular instance, does it not?

A. I would say it is pretty hard to judge just how much you need not to cause your wing to stall out. I have seen it with just a little bit and——

Q. Irrespective of what you may have seen, please answer the question; what the effect if any is on the lifting characteristics of an airplane depends in large part upon the amount of frost and its nature at the particular time of [64] take-off, is that not true? A. No, that is not true.

Q. You think the same effect would apply whether there is a little or a large amount of it?

A. That is correct.

Q. Even though there were just a few specks of frost, still the lift characteristics of the wing would be completely destroyed? A. That is correct.

Q. Just a few crystals on top the wing?

A. By a few, I do not know how many you mean.

Q. I tried to discover whether you have some notion as to where the line falls. You have just testified it doesn't make any difference whether the amount is very small or not, just a few particles of

(Testimony of Emmett Flood.)

frost might destroy the lift characteristics of a wing. Do you want to change that testimony?

A. No, that is correct.

Q. As an experienced pilot, you still wish to be understood as saying that even a few crystals put on the plane, as you would salt out of a salt shaker, would still destroy the lift characteristics of the airplane?

A. Negative. I am referring to a rain cloud that may pass over the airport at the time the airplane is on the ground and completely cover it. I mean it don't have to be a large amount, that is what I am referring to. [65]

Q. I am asking you specifically, irrespective of clouds or anything else, whether a very small amount of frost will destroy the lift characteristics of the wings?

A. Well, if you put two or three drops on it, I don't think it would, but weather conditions—I mean frost is caused by clouds.

Q. Let's not go into the history of the formation of frost, and so forth. Just give us a little more of your opinion, if you have one, as to whether even a small or minute quantity of frost will destroy the lift characteristics of the wings?

A. Yes.

Q. You didn't see this accident at all, did you?

A. No, sir.

Mr. Cluck: That is all.

(Testimony of Emmett Flood.)

Redirect Examination

By Mr. Matthews:

Q. Have you had any actual experience in the flying of an airplane where there was a very small amount of frost on the wing and experienced difficulty in taking off? Answer yes or no.

A. Yes, sir.

Q. Will you tell us how much frost was on the wing of that airplane when you had difficulty?

Mr. Cluck: I object. Your Honor, this is going into [66] the same matter the Court already ruled on, the circumstances of the particular case.

Mr. Matthews: I think you opened it up.

Mr. Cluck: No, we didn't.

The Court: The objection is sustained.

Mr. Matthews: That is all.

Mr. Cluck: What are you doing now?

The Witness: I am an airline captain.

Mr. Cluck: Employed by what concern?

The Witness: Do I have to answer that?

Mr. Matthews: Yes, go ahead and answer it.

The Witness: With the Flying Tiger Line, Inc.

Mr. Cluck: That is all.

The Court: Step down. Call the next witness.

RICHARD DAVISON

called as a witness by and on behalf of defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Matthews:

Q. Will you state your name?

A. Richard Charles Davison.

Q. What is your business?

A. Aircraft mechanic, engine mechanic. [67]

Q. What ratings, if any, do you hold from the CAA?

A. Engine license.

Q. How long have you been engaged in this line of business?

A. Approximately 11 years.

Q. By whom are you employed?

A. Pacific Airmotive Corporation.

Q. Where are they located?

A. On Boeing Field.

Q. How long have you been with them?

A. Approximately nine years.

Q. What is your job down there?

A. Shop superintendent.

Q. How long have you been shop superintendent?

A. At this location, approximately three years.

Q. Were you shop superintendent of this concern on January 2 and during the month of January, 1949?

A. Yes.

Q. State whether or not at the request of the Civil Aeronautics Board you made an examination

(Testimony of Richard Davison.)

of the engines on a certain airplane described as a Douglas DC-3 No. 79025?

A. I made an examination of two engines. I do not recall the specific aircraft number.

Q. State whether or not it was the airplane that was involved in the crash on January 2, 1949, when the Yale students were killed and injured at Boeing Field? [68]

A. It was.

Q. What examination did you make of the engines following the crash?

A. We took the engines and made a visual external examination first, and then disassembled the engines for an internal visual examination.

Q. Will you describe briefly the nature of that examination and the purpose of it?

A. Well, the nature was, as fully as possible, a description of the actual shape of the engines as we received them, and the purpose of it was for this report to the Civil Aeronautics.

Q. I mean, state whether or not your purpose was an effort to determine whether or not from your examination you could find any evidence of power failure or malfunctioning of the engines?

A. That was the actual purpose, to determine the actual condition of the engine regarding any power failure or anything other than normal engine.

Q. State whether or not you made a complete and thorough examination of the engines and/or its component parts?

A. We did.

Q. From your examination were you able to find any evidence of malfunctioning or power failure in the engines?

(Testimony of Richard Davison.)

A. Nothing from the remains of the engine. [69]

(Record of external visual inspection marked Defendant's Exhibit A-4 for identification.)

Q. Handing you what has been marked for identification Defendant's Exhibit A-4, I will ask you if you will examine that document and state whether or not——

The Court: State if you know what that document is, if you know what it is.

Q. State what the document is. Just answer yes or no. A. Yes.

Q. Is that document signed by you?

The Court: May I suggest the proper answer to the form of question which I suggested, state if you know what that document is, would permit the witness to answer what it is, assuming in making the answer that he does know.

Q. What is that document?

The Court: If you know what it is.

A. It is a record of our inspection of the engines.

Mr. Matthews: I offer Exhibit A-4 in evidence.

Mr. Cluck: Your Honor, I would like to ask the witness a question or two before making objection.

The Court: If you believe that it reasonably relates to the admissibility of the document——

Mr. Cluck: Yes, it does.

The Court: Then you may do that. [70]

Mr. Cluck: Did you prepare that exhibit?

The Witness: Yes.

(Testimony of Richard Davison.)

Mr. Cluck: For whom did you prepare it?

The Witness: For the Civil Aeronautics.

Mr. Cluck: Was it used as a part of the hearing conducted by the Civil Aeronautics Board?

The Witness: That I do not know.

Mr. Cluck: Did you furnish it to them in connection with their investigation of the accident which is the subject matter of this suit?

The Witness: Yes.

Mr. Cluck: I object to the introduction of the exhibit on the grounds previously indicated, your Honor. He does say that he doesn't know whether it was used, but it was, he said, prepared at the request of the Civil Aeronautics Authority immediately after the accident.

The Court: Will you read the statute or regulation which was cited yesterday on a subject which seems to me to have been the type of subject which you claim this is?

Mr. Cluck: 49 U.S.C.A., Sec. 581. I will get the code and read your Honor the full text, if it is desired, but the applicable part reads as follows: "... no part of any report or reports of the former Air Safety Board or the Civil Aeronautics Board relating to any accident, or the investigation thereof, shall be admitted [71] as evidence or used in any suit or action for damages growing out of any matter mentioned in such report or reports."

The Court: Would you say why this does not come within the scope of that statute?

Mr. Matthews: Your Honor, the CAB did pub-

(Testimony of Richard Davison.)

lish a report of this investigation. This, however, is not that report or a part of that report. I have the report of the CAB here, and I think that in this particular case where the United States is a party and where the United States has conducted an investigation and made findings by people selected by them, that there certainly should be a stop to take a different position, that that statute should not apply in a case where the United States—certainly insofar as the United States is concerned, the statute should not apply even to the report itself, and certainly this document, which I will say to the Court I did not obtain from the CAB, I got it from the office where this man is employed. It is down there at their office. I obtained it from them. The mere fact that they may have turned it over to the CAB, I would not think would make it inadmissible.

The Court: Do you wish to cite any judicial authority in support of your contention distinguishing and excepting this material from the operation of the statute? [72]

Mr. Matthews: No, your Honor, I don't have any authority at this time to cite.

The Court: Not having any authority to support the requested ruling that this is an exception from the application of the statute, the Court is not authorized to hold that it is an exception and sustains the objection, in view of all that has been developed in connection with this exhibit.

Mr. Matthews: No further questions.

(Testimony of Richard Davison.)

Cross-Examination

By Mr. Cluck:

Q. You referred to the remains of the engine. I took it from that you meant that they were subject to a considerable state of destruction at the time you made your inspection, is that true?

A. Yes, I would say they were in a considerable state of destruction.

Q. So that all you could do was to take the remains of the engine as they were made available to you and do your best on that basis?

A. That is correct.

Q. So that considering there had been a fire and consequent destruction, is it not the case that there may have been many things happening to the engines, whatever kind that wouldn't be available to you by way of evidence when you [73] saw the remains?

A. I might answer that this way: externally the engines were considerably destroyed, along with most of the accessories.

Mr. Cluck: That is all.

The Court: You may step down. Call the next witness.

Mr. Matthews: May Mr. Flood be excused?

Mr. Cluck: Yes.

The Court: Mr. Flood is excused.

Mr. Matthews: May Mr. Davison be excused?

Mr. Cluck: As far as we are concerned.

The Court: Mr. Davison is excused.

LAWRENCE STRONG

called as a witness by and on behalf of defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Matthews:

Q. Will you state your name?

A. Lawrence J. Strong.

Q. What is your business?

A. Aircraft instrument technician.

Q. Where do you live?

A. 801 Spring Street.

Q. How long have you been engaged in your present [74] occupation?

A. About nine years.

Q. By whom are you employed?

A. The Instrument Laboratory, Inc.

Q. What is the business of that concern?

A. The manufacture and repair of all types of instruments.

Q. What license, if any, do you hold from the CAA?

A. Instrument mechanic's license.

Q. How long have you held such a license?

A. Since approximately 1946.

Q. You have been engaged in this same line of business continuously since you obtained your license?

A. Yes, sir.

Q. I will ask you to state whether or not you made an examination of the instruments on the Douglas DC-3 airplane that was involved in the

(Testimony of Lawrence Strong.)

crash at Boeing Field on January 2, 1949, that being the crash in which the Yale students were killed and injured? A. I did make the examination.

Q. I will ask you if you have with you the notes and memorandum that you made in connection with that examination? A. Yes, sir.

(Notes of Lawrence Strong marked Defendant's Exhibit A-5 for identification.)

Q. From your examination of the instruments on this [75] airplane, were you able to find any evidence of failure, malfunctioning of any of the instruments?

A. Discounting the damage from fire, water and impact, no.

Q. Calling your attention to what has been marked as Defendant's Exhibit A-5, I will ask you to state if you know what that exhibit is.

A. The exhibit is my notes, typewritten, of the condition in which I found the instruments that I inspected.

Q. I think yesterday you had your own notes in your own handwriting? A. I have.

Q. Do you still have those notes?

A. Yes, sir.

Q. Is this an exact copy of those notes?

A. An exact copy.

Q. Do you have the notes with you?

A. Yes, sir.

(Testimony of Lawrence Strong.)

Mr. Matthews: Mr. Cluck, do you raise any question as to whether or not this is a copy?

Mr. Cluck: No.

Mr. Matthews: I offer this exhibit in evidence.

Mr. Cluck: No objection, your Honor.

The Court: Admitted.

(Defendant's Exhibit A-5 received in evidence.) [76]

DEFENDANTS' EXHIBIT A-5

January 11, 1949.

C. A. A. Repair Station #2738

Jack & Heinz Horizon #AF-45-116225

1. Air filter found fairly clean.
2. Instrument seals burned off.
3. Instrument found uncaged.
4. Front and back pivots and bearings on Gimbal ring found oiled and good, and could have operated.
5. Horizon bar pivots and guide bar found good, and could have operated.
6. Rotor housing pivot and bearing found good, and could have operated, although air seal was found quite dirty.
7. Rotor pivots and bearings found in good shape.
8. Instrument in general was in operating condition at time of crash.

.....,
Larry Strong, Aircraft Instrument Mechanic License #535948.

January 11, 1949.

C. A. A. Repair Station #2738

Directional Gyro Control Box #14262 for Mark III
Automatic Pilot

1. Instrument seals burned off.
2. Instrument found caged and on 30° heading and follow up cord on 320° heading.
3. Instrument cage shaft was clean, showing instrument caged before fire.
4. Upper vertical pivot and bearing found good and could have operated.
5. Pick-off plate and shrouds found clean and could have operated.
6. Bottom vertical pivot and bearing found good and could have operated.
7. 90° bearing popped open and retainer plate badly damaged. 270° bearing retainer plate shows no damage. 90° and 270° bearings and pivot balls found clean and lubricated.
8. Rotor shaft and bearings found clean and lubricated and could have operated.
 - A. Instrument appeared to have been in operating condition.
 - B. Greatest damage on 90° end same as D.G. unit.

.....,
Larry Strong, Aircraft Instrument Mechanic License #535948.

(Testimony of Lawrence Strong.)

January 11, 1949.

C. A. A. Repair Station #2738

Model A3 Sperry Gyro Pilot #15954

Bank & Climb Unit

1. Instrument seals burned off.
2. Instrument found in uncaged position.
3. Found to have been very, very hot from fire.
4. Shrouds and pick-off plates badly burned.
5. Horizon bar bearings and pivots still had some oil in them.
6. Front air bearing retainer plate badly damaged and bearing popped open and air seal popped open.
7. Rear horizontal pivot and bearing still clean and contain oil, and could have operated.
8. Rotor housing pivots and bearings dry and rusty, probably due to heat and condensation. Air bearing on rotor housing had some oil in it.
9. Rotor pivots and bearings well lubricated and clean. Instrument could have been operating O.K. at time of crash. Instrument in very poor shape due to corrosion—heat and moisture from fire.

.....,

Larry Strong, Aircraft Instrument Mechanic License #535948.

(Testimony of Lawrence Strong.)

January 11, 1949.

C. A. A. Repair Station #2738

Sperry D.G. #1342

1. Air filter burned too badly to estimate number of hours on instrument.
2. Seals on instrument burned beyond recognition.
3. Instrument cage shaft was clean, showing instrument caged before fire.
4. 90° horizontal Gimbal bearing was found popped open.
5. 90° and 270° Gimbal bearings found well oiled and apparently recently serviced.
6. Rotor shaft and bearing found in good condition (well greased).
7. Top vertical bearing found in good condition.
8. Bottom support bearing found good (pivot sides rusty).

A. Instrument appeared to have been recently serviced and could have been operating O.K. at time of crash.

B. 90° bearing and 270° bearings show impact damage. 90° bearing was popped open and retainer plate was damaged far worse than 270° bearing.

.....,

Larry Strong, Aircraft Instrument Mechanic License #535948.

Admitted October 11, 1950.

(Testimony of Lawrence Strong.)

Mr. Matthews: That is all.

Cross-Examination

By Mr. Cluck:

Q. In this exhibit reference is made to caging of instruments. What does caging of instruments mean?

A. Cage is another word to say lock the instrument, render inoperative.

Q. With reference to what particular directional instruments is that term ordinarily used?

A. Would you state that again, please?

Q. With what particular directional instrument or instruments is that term frequently used?

A. It is used only in respect with gyro instruments.

Q. Would you tell us in as simple language as you can what you mean by gyro instruments?

A. A gyroscopically stabilized instrument.

Q. What would such instrument be on this particular DC-3 aircraft?

A. One instrument was called a directional gyro, used for indicating direction headings which are taken off of the magnetic compass and checked every 15 minutes. The next instrument would be the directional control box, used with the automatic pilot. The next instrument is called a bank and climb box that controls the altitude of the aircraft on the automatic pilot, and the fourth instrument would be the [77] artificial horizon.

(Testimony of Lawrence Strong.)

Q. You mentioned the automatic pilot and the directional control box. Could you tell us briefly in ordinary laymen's language what that is in this particular DC-3?

A. The directional control box controls only the direction of the aircraft.

Q. With reference to vertical or horizontal axis?

A. With reference to heading on a horizontal plane.

Q. Right or left, in other words?

A. Yes, sir.

Q. What does the automatic pilot do? You mentioned that.

A. That is a part of—the automatic pilot consists of two boxes, a directional box and a bank and climb unit. The bank and climb unit is self-explanatory. It controls the bank of the plane and the climb.

Q. In ordinary laymen's language, what is the automatic pilot?

A. It is an automatic device for flying the airplane without human control.

Q. If the automatic pilot is uncaged on take-off, what happens?

A. Nothing would happen. The motors would operate, the instruments would operate, but nothing would happen.

Q. If it is caged on take-off, what happens?

A. Nothing would happen.

Q. If it is uncaged on take-off and the airplane

(Testimony of Lawrence Strong.)

gains [78] speed on its initial run prior to flight, what happens?

A. May I back up a little bit? We might be working our way into a hole here. When I made the statement saying that the cage mechanism renders the instruments inoperative, that was correct, but you also have an on-off valve for your hydraulic pressures that these instruments control; so when you asked me if the instruments were caged what would happen, I said nothing. If the off valve were off, nothing would happen. If the instruments were uncaged and the off valve were off, nothing would happen.

Q. Let's assume that the switch you spoke of was on. I will ask the question this way. To make the automatic pilot operative in controlling direction right and left, what has to be the condition of your switches or instruments?

A. You must have your instruments uncaged. Your directional unit shall have the follow up indexes lined up and your valve must be in the on position.

Q. If those conditions obtained on take-off, what would be the effect as the airplane gained speed on its take-off run?

A. You will have to state the question in a little plainer way. Give me a hypothetical question.

Q. I am taking the same situation you have just mentioned, the condition where the instrument operates. I am asking you what the effect would be on a

(Testimony of Lawrence Strong.)

take-off run as the airplane [79] gained speed if such conditions obtained.

A. If the follow up indexes on the directional unit were lined up and the follow up indexes on the bank and climb unit were in somewhat of a normal attitude for the position of the plane, the valves were turned on, the instruments were uncaged, the aircraft would assume flight.

Q. Irrespective of assuming flight, what would be the effect as far as turning right and left is concerned?

A. It would keep it in a straight line.

Q. If the headings were different than the direction of the runway, what would be the result?

A. At what time? You spoke of the aircraft picking up speed.

Q. Yes. A. At what point in that?

Q. At any time during the time prior to take-off.

A. The minute that the engines had been run for five minutes, everything is operating as we spoke of, the airplane starts down the runway, and as you stated, the follow up indexes were not on the right heading, the aircraft would immediately have full rudder applied to correct for the misalignment of the follow up indexes.

Q. I am speaking now of the operation of instruments, not what the pilot might do. What would be the effect of the automatic pilot in controlling the right and left direction [80] of the airplane?

A. The automatic pilot would immediately apply full rudder, depending on which way the displacement was.

(Testimony of Lawrence Strong.)

Q. And cause the airplane to swerve either right or left depending on what the setting was?

A. With the tail off the ground, it would.

Q. You made some study there, as indicated by the exhibit, in connection with the probable settings of the instruments, did you not?

A. Yes, I noted that in my report for my examination.

Q. You noted that the heading on the gyro and the heading on the automatic pilot were probably the same?

A. Relatively so.

Q. What is the significance of that?

A. It would indicate that the instruments were—both the directional unit of the pilot and the directional unit of the gyro were approximately on the same headings.

The Court: At this point we will take a ten minute recess.

(Recess.)

The Court: You may resume the interrogation of the witness.

Q. Mr. Strong, you spoke of two directional instruments being on the same heading, plus or minus a certain number of degrees. Could you indicate what might cause that? [81]

A. The instruments both being on the same heading, could have been on that heading due to the fact that they were caged on the heading or that they were operating on that heading.

Q. That they were operating on that heading during the course of take-off?

A. Yes, sir.

(Testimony of Lawrence Strong.)

Q. If operating on that heading in the course of take-off, they would cause the airplane to veer from the runway, is that right, unless the pilot took crucial measures?

A. No, sir. If the instruments were operating on the correct heading, the follow up indexes in the directional control box were lined up, would keep the aircraft in a straight flight position.

Q. Yes, but if they were on the wrong heading, on a 90 degree heading or the wrong heading, the opposite would be true, wouldn't it?

A. No, sir. To make it a little clearer, in the directional control box of the automatic pilot you have a directional card, the same as your direction gyro, which we understand. You also have what they call a follow up card, the same markings on it identically. That has to be lined up right to the degree before the automatic pilot is turned on. The gyro controls the card, that is controlled by the caging knob. The bottom card is controlled by a follow up [82] knob that you turn to bring it to the correct heading. When I spoke of both instruments being on the same heading, I meant to say the directional box, gyro control box, wasn't found on the same heading. It had the same impact damage, proving it was on the same heading as the directional gyro.

Q. So that aside from impact damage causing the two instruments to adopt indications of the same heading, it would be operations of the instrument

(Testimony of Lawrence Strong.)

during the course of take-off that would cause it, is that right?

A. No, sir. The instruments could suffer the same impact damage if they were caged or uncaged.

Q. Yes, but apart from the possibility of the same impact damage, the indication would be that they were operating, is that correct?

A. No, sir. There was no clue to whether they were operating or not.

Q. What would cause the two instruments to show the same heading at the time you examined them? The same impact damage, you say, is that correct?

A. Yes, sir.

Q. Is it likely or unlikely that that would be the cause?

A. Would you put the question again, please? I am having a little trouble.

Q. Is it likely or unlikely that impact damage which you mentioned as one of the possible causes would be the [83] real cause?

A. The impact damage was the only clue that I had that the instruments were on the same heading.

Q. What I am getting at is what are the probable causes of their being on the same heading when you found them there?

A. The probable causes of being on the same heading, one would be probability, the other that they were operating.

Q. That they were operating prior to take-off?

A. Yes, sir.

Q. The direction, the compass heading that those

(Testimony of Lawrence Strong.)

two settings would be for would be 90 degrees plus or minus what?

A. The instruments were not found on the runway heading. The impact damage indicated that they were on a 90 degree heading plus or minus 10 degrees either way.

Q. Both of the instruments?

A. Both of the directional units.

Q. I believe you said you found the instruments at the time you examined them in the caged position, is that correct?

A. The directional instruments.

Q. Other instruments were uncaged, is that correct?

A. The bank and climb unit and the artificial horizon were uncaged.

Q. If they were uncaged, you said they would be operating if they were functioning normally, is that correct?

A. Yes, sir. [84]

Q. Could the instruments be caged by impact, that is the directional gyro and the automatic pilot?

A. The directional box and the directional gyro could be caged by impact, something hitting the panel or pushing the caging knobs in.

Q. You spoke of an operative valve in connection with the automatic pilot being off or on. Where is that valve located?

A. That I am not familiar with in a DC-3.

Q. You don't know where it is with reference to the instruments you mentioned?

A. No, sir.

Mr. Cluck: That is all.

(Testimony of Lawrence Strong.)

Mr. Matthews: Was there anything in your examination that indicated to you whether this airplane at the time of the take-off was or was not on instruments? Could you tell from your examination?

The Witness: No, sir.

Mr. Matthews: That is all. May this witness be excused?

Mr. Cluck: Yes.

The Court: Mr. Strong is excused.

R. P. JANDL

called as an adverse witness by and on behalf of defendants, having been previously duly sworn, was examined and testified as follows: [85]

Direct Examination

By Mr. Matthews:

Q. Will you state your name?

A. R. P. Jandl.

The Court: You were on the stand yesterday and have already been sworn?

The Witness: Yes.

The Court: The witness Jandl is now on the stand for further examination.

Q. Did you receive from the United States Marshal a subpoena duces tecum to bring with you certain records concerning the airplane which is the subject matter of this litigation? A. Yes.

Q. You have that subpoena with you?

A. Yes.

(Testimony of R. P. Jandl.)

Q. May I have it, please?

Mr. Matthews: Let the record show, Your Honor, Mr. Jandl is called, of course, as an adverse witness.

The Court: Let the record show Mr. Jandl is now called by the defendants as an adverse witness.

Q. How long had you been associated with Mr. Leland in the business of operating this non-scheduled airplane prior to January 2, 1949?

A. I was working with him in the capacity of a public [86] accountant and auditor on his records since about May, 1947.

Q. Did you perform any other duties for him other than strictly services as accountant and auditor?

A. Well, I helped him out in any way I could if I were down there, but other than that I relegated my duties to that.

Q. What duties have you performed for him other than duties of auditor and accountant?

A. If he asked some advice on certain things, buying planes and like that, I would give him that type of advice, or with regard to the operation. I had nothing to do with it as far as that is concerned.

Q. Did you have access to the books and records of the office? A. Yes.

Q. Over what period of time?

A. During this period, the entire period.

Q. That you spoke of? A. Yes.

Q. As administrator of the Leland estate, were

(Testimony of R. P. Jandl.)

all the records of Mr. Leland turned over to you?

A. In view of the confusion at the time I endeavored as assemble all the records. I found I couldn't get them all, though for some reason either the CAA got hold of them or the insurance company requested information, and I turned [87] everything over to them, let them go through the file, pick out whatever they wanted to. Whether they returned it all, I don't know.

Q. The insurance company requested you to turn over the logs?

A. I don't know. I turned over the files, I don't know what they got. As far as the logs are concerned, the logs were always in the airplane.

Q. How do you know that?

A. That was the customary procedure.

Q. Were you ever in the airplane?

A. Yes, I was in the plane. The logs were always in what they call a bag, a pilot bag.

Q. What kind of bag?

A. A pilot bag which had the operations manual and the logbooks and other pertinent data applicable to the plane.

Q. Have you ever examined those logs?

A. No, not other than just know they were there.

Q. Do you know whether they were up to date or not?

A. No, I don't.

Q. You were requested by the insurance company to turn over to them the logs?

A. I don't recall right now at this late date.

Q. What request was made upon you? You said

(Testimony of R. P. Jandl.)

you turned some records over to the insurance company. [88]

A. The insurance company came down, wanted to go through the records. I says, "Here's the pile of records. You go through and pick out what you want."

Q. Were there any logs in those records?

A. I don't believe so, because the logs were in the plane, as far as I know.

Q. On the subpoena duces tecum served on you, you were requested to bring here all logs, maintenance records and books pertaining to the engines, propellers and aircraft log books of that certain Douglas DC-3 airplane No. NC 79025 referred to in plaintiff's amended complaint in the above-entitled action. Do you have those records with you?

A. I couldn't find any trace of them in the records I have.

Q. Any of those records?

A. None of those records, no.

Q. Do you know what became of those records?

A. No, I don't.

Q. Did you ever see any of the maintenance records or books pertaining to the engines and propellers of the aircraft?

A. Yes.

Q. What happened to them?

A. I don't know. I surmise they were in the plane and destroyed in the crash, but I don't know.

Q. Did you turn any such records as I have referred to [89] over to the CAA or CAB?

A. No.

(Testimony of R. P. Jandl.)

Q. Is it your testimony that they didn't have there in the office any maintenance records or books pertaining to the engines, propellers or the aircraft?

A. I said they didn't have them when I took over the records at the time. I don't know what happened to them prior to that. They might have been in the office and taken out.

Q. When did you take over?

A. On the 5th of January, I believe.

Q. Were you down there the night of the accident?

A. I was down there till about 8 o'clock. Then I went home and didn't get down till the next day.

Q. What were you doing down there that night?

A. Mr. Leland wanted to see me before he left the airfield.

Q. What about?

A. About the operation of the business during his absence. He was planning on going to Washington, D. C.

Q. Were you going to look after operations for him during his absence?

A. No, he wanted me to look after his other business interests. He had an operations man there.

Q. Were you down there the next morning after the crash?

A. Yes, I was down there in the morning. [90]

Q. What time did you get down there?

A. About 10 o'clock, I believe. I am not certain of the time.

(Testimony of R. P. Jandl.)

Q. Did you have access to the records that morning?

A. I had access to them, but I—everybody had access to them, as far as that is concerned. Nothing was locked up.

Q. You mean everybody, the general public, or just yourself and the CAB?

A. Anybody in that particular office. There was two outfits who shared the same office. Whoever came in the office could have gone through the files. They were not locked, in other words.

Q. You mean just any stranger that walked in could have carried away the records?

A. I doubt it, no, but anybody in the office could have.

Q. The second group of documents I asked you to bring were all weight and balance forms or manifests and all passenger manifests, books and records giving the names of the passengers and the weight of baggage and the amount of gasoline and oil carried on the west bound flight of said Douglas DC-3 airplane No. 79025 covering the westbound flight of said plane from Bridgeport, Conn., to Seattle, Washington, on or about December 16, 1948. Do you have those records with you?

A. The only thing I could find, going through the [91] records the other day, was a copy of the westbound manifest.

Q. May I see that, please?

A. And a copy of the original weight and balance when he left Bridgeport.

(Testimony of R. P. Jandl.)

Mr. Cluck: We have two or three questions to ask relating to admissibility of this document after counsel has examined.

(Westbound manifest marked Defendant's Exhibit A-6 for identification.)

Q. Mr. Jandl, referring to what has been marked for identification as Defendant's Exhibit A-6, will you state what that is?

A. That is a copy of the manifest of the westbound flight of these particular students.

Q. Where did you get this manifest?

A. I got it—I believe it was returned to me from the person who was in charge of the eastern operation, and he turned it over to me when he came back and checked in his cash and his other accountability of funds.

Q. Who was that person? A. Walt Keith.

Q. Where is he now? A. I do not know.

Q. Was he working for Mr. Leland?

A. Yes. [92]

Q. Is he the man that lined up this westbound trip? A. Yes.

Q. And this westbound manifest which contains the names of these Yale students that came west on the plane was turned over to you by him?

A. Yes.

Q. Was there any other eastern representative representing Mr. Leland besides Mr. Keith? Did he have any other employee back there?

(Testimony of R. P. Jandl.)

A. None other than the pilots who were stationed there, who were going back and forth.

Q. When was this document turned over to you by Mr. Keith?

A. About the middle of January.

Q. What were the circumstances under which he turned it over to you?

A. When he was accounting for the funds he handled any expenses he had.

Q. Did he collect the money for the fares for these Yale students on the westbound trip?

A. Yes. He didn't collect it from the initial students, no, but he collected from the agency who handled the deal.

Q. Then turning over to you the money, and at the same time he turned over to you this westbound manifest?

A. I had the money before, but he was turning over the accountability of it, and during that operation. [93]

Q. In the accountability, was that records kept by him in the ordinary course of business, managing the affairs of Mr. Leland?

A. Yes, records he kept, which weren't very good.

Q. Was this one of the records that he turned over to you? A. Yes.

Q. Would you say that this was a record he kept in the ordinary course of his duties?

A. I would say so, yes.

Q. As eastern agent of Mr. Leland?

(Testimony of R. P. Jandl.)

A. Yes.

Mr. Cluck: Before this exhibit is offered, before the ruling is made on it, I would like to ask certain questions. Has it been offered yet?

Mr. Matthews: No, not yet. I am continuing my identification.

Q. (By Mr. Matthews): Are the names of the students that made the trip or started out on the eastbound trip which ended in a crash, with the exception of one student that I understand did not go back, except for that one student are all the other students the same that were making the eastbound take-off as came out on the westbound take-off?

A. I never checked it, but I surmise it is.

Q. Mr. Jandl, have you made a search to find out if there is any other westbound manifest other than this one [94] that has been marked for identification as Defendant's Exhibit A-6?

A. This is the only one I could find. The CAA requested others, and I know prior to the time I got this there weren't any copies in my possession at the time, because either the CAA or the insurance company or Mr. Houghton's office had copies.

Q. Did you turn over any copies of a westbound manifest to Mr. Houghton?

A. I don't recall, but I might have. I turned over anything he wanted that I could find.

Mr. Matthews: Is there any dispute—I can call Judge Paul, who acted as the administrator and guardian ad litem for these various students—is there any dispute as to whether or not the students

(Testimony of R. P. Jandl.)

who were on the eastbound flight were the same as on the westbound flight, with the exception of one student?

Mr. Houghton: So far as I know, one or two. Anything we have on that, of course, is just hearsay and we are not too sure of it.

The Court: Just say yes or no. There is no need of encumbering the record with a discussion.

Mr. Houghton: We are not prepared to make a statement on that, Your Honor.

The Court: Proceed with your proof. [95]

Q. Mr. Jandl, as administrator of the Leland estate, certain claims were served upon you as administrator for personal injuries and death sustained by these students that were involved in this accident, were there not? A. Yes.

(Stipulation and agreement marked Defendant's Exhibit A-7 for identification.)

The Court: After you have seen it will you as best you can do so make a statement of what it is, if you think you can make a statement that will be acceptable to opposing counsel. If you do not feel you can, do not answer the Court's request.

Mr. Matthews: If the Court please, this is a stipulation and agreement which was entered into between R. P. Jandl, administrator of the estate of William F. Leland, and the defendants in this cause which covers the settlement that was made for all the claims for personal injuries and death covering

(Testimony of R. P. Jandl.)

the students that were on the plane at the time of this attempted take-off.

Mr. Houghton: Your Honor, might I suggest this. We don't want to put Mr. Matthews to any unnecessary trouble in identifying these students, and it occurs to me that if he has some other matters to go into with the witness; if that is what he is doing, attempting to identify the students, probably at noon we could check them and agree [96] on their identity. We were not being arbitrary in refusing to agree to that. We wanted to be sure we were correct about them all being the same ones except one.

Mr. Matthews: I think you know the names of the students that were on the plane, because claims were filed for each one of them and this stipulation sets out their names, and you have signed it. Mr. Jandl has signed it and the Superior Court has approved it, and they are the same names on that westbound manifest. All I want to know is will you admit the names that appear on the westbound manifest, with the exception of one name, are the same students that were on the plane when it took off going east.

Mr. Houghton: Perhaps I could do this. I have not compared the two lists, but I am willing to stipulate that the names on this stipulation are the names of the students who were on the plane going east.

The Court: With one exception mentioned by Mr. Matthews?

Mr. Houghton: What I mean, Your Honor, is

(Testimony of R. P. Jandl.)

that we are willing to agree that all the students whose names appear on the stipulation were on the plane going east, and then it would be a matter of comparing the two lists.

The Witness: That is what I am doing now.

The Court: Proceed. You have not done anything yet.

Q. (By Mr. Matthews): Do you have a copy of that stipulation [97] I have referred to?

A. No.

Q. Have you some way of checking to find out whether these students were the same?

A. That is what I am doing right now.

Mr. Houghton: Might I ask, Your Honor, what he is checking?

A. I am checking the eastbound with the westbound.

Mr. Houghton: He is talking about this piece of paper here, the stipulation.

Mr. Matthews: I will withdraw my question, if he has some other way to identify these students on the westbound manifest, that is agreeable with me. Go ahead with your checking.

The Court: Can you pass to some other subject of inquiry respecting this witness' examination?

Mr. Matthews: I think he will just have to run down a list of names, and it would break the continuity of my examination.

The Court: You may have a reasonable pause to do that.

The Witness: Yes.

(Testimony of R. P. Jandl.)

Q. The answer is yes?

A. The westbound manifest is the same as the eastbound manifest, with the exception of one student.

Q. What is the name of that student? [98]

A. C. Engel.

Q. If I understand you correctly, Exhibit A-6 sets forth correctly the names of the students that were on the plane at the time of the take-off, with the exception of Mr. Engel? A. Yes.

Mr. Matthews: I will offer Exhibit A-6 in evidence.

Mr. Cluck: We would like to have a few questions.

The Court: If you feel they reasonably relate to the admissibility, you may ask them.

Mr. Cluck: They do, your Honor. Did I understand you correctly to say that the first time you saw what you designated as a westbound manifest was the middle of January?

The Witness: Yes.

Mr. Cluck: Did you have anything to do with its preparation?

The Witness: No.

Mr. Cluck: Did you have any knowledge as to how it was prepared?

The Witness: Not immediate knowledge.

Mr. Cluck: Where were you when it was prepared?

The Witness: I was in Seattle.

Mr. Cluck: Where was it prepared?

(Testimony of R. P. Jandl.)

The Witness: In Bridgeport. [99]

Mr. Cluck: Bridgeport, Connecticut?

The Witness: Yes.

Mr. Cluck: Let me ask you this, do you have any direct knowledge about the time or manner of its preparation?

The Witness: No.

Mr. Cluck: Who ordinarily kept the papers designated as manifests?

The Witness: You mean when they were turned into the Seattle office?

Mr. Cluck: At any time. Who was the custodian of them?

The Witness: Well, the clerk in the office, I imagine, or Lyle Lucklichtner, who was supposed to take care of those things.

Mr. Cluck: You were never custodian of them yourself?

The Witness: No.

Mr. Cluck: So that you have no direct personal knowledge about anything appearing on that form, is that what it amounts to?

The Witness: No, no direct personal knowledge.

Mr. Cluck: We object to its admission, and I will be very brief in indicating the grounds. The most liberal rule that counsel could cite is that set forth in the Washington State statute, particularly Remington's Revised Statutes, Sec. 1263-2. We feel that under the [100] provisions of Rule 43 A of this court they would have the right to invoke that statutory provision. That is 1947 statutes, with which

(Testimony of R. P. Jandl.)

the Court is familiar, entitled "Admissibility—Preliminary showing," and reads as follows: "A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the Court, the sources of information, method and time of preparation were such as to justify its admission."

Referring in order to those requirements, which are cumulative, the statute requires first that the custodian or other qualified witness testify as to its identity. We submit that no showing has been made on that score. The witness surmised something, but what happened was that as an accountant he was handed a paper by one Walter Keith, prepared at Bridgeport, Connecticut, which had nothing to do as far as the operations of business are concerned. If counsel wished to call as a witness someone in charge of operations or the particular person having custody of the record, that is a different matter, but certainly Mr. Jandl, who is simply employed in an advisory [101] capacity, is not the witness to be called.

The next thing, testify as to the mode of preparation, the witness indicated he was in Seattle when it was prepared in Bridgeport, and he knows nothing about it.

The further requirement, made in the regular

(Testimony of R. P. Jandl.)

course of business. It is true the witness said he surmised it was made in the regular course of business, but that is all and that is not sufficient.

At or near the time of the act, condition or event. That is not shown.

Finally, if in the opinion of the Court the sources of information, method and time of preparation were such as to justify its admission. Apart from those requirements, here is what defendants are seeking to do, as far as is apparent. They are attempting to show by this piece of paper, an unsigned piece of paper upon which names of the students and their weights are listed, that this airplane at the time of the take-off on January 2 was overloaded. Whether anyone used the scales and put each of those persons on the scales is to be inferred, or whether the inquiry was made simply of the particular passenger as to what his weight was as his opinion, but whether there was any scaling or questions were asked, all of those questions and a lot more certainly would be such as we would be privileged to ask on cross-examination [102] and which we have no opportunity whatsoever to ask at this time. If counsel wished, he had up until this time to take the deposition of Mr. Keith, so far as we know, plenty of time to do that before trial. If that had been done, we would have the opportunity to have our privilege of cross-examination.

We submit that in consideration of all of those things this exhibit is not admissible and that it should be particularly scrutinized in view of the

(Testimony of R. P. Jandl.)

efforts of defendants to prove what they regard—we don't agree with them—but what they regard as an important issue in the case.

The Court: What is the section number of Remington's Revised Statutes?

Mr. Cluck: Sec. 1263-2. That is set forth in the 1947 Supplement, the act passed in 1947.

The Court: You spoke of Rule 43 A. Do you mean the Federal Rules of Civil Procedure?

Mr. Cluck: That is correct, your Honor.

The Court: I will hear counsel offering the exhibit.

Mr. Matthews: If the Court please, the witness testified that Mr. Keith was the only eastern representative that Mr. Leland had, that he was the man that arranged for this westbound flight, that this record, this manifest, was turned over to him as administrator of the estate [103] along with the accounting which Mr. Keith made for the distribution of the money, disbursement of the funds that was charged for this charter, that it was kept in the ordinary course of business and that it has been in his custody and that he knows of no other westbound manifest other than this one, and it seems to me that it being the only record that the business kept or that is available, and since it was found and turned over to this witness by a regular representative, the very man that arranged the flight, that it is certainly admissible as proof of what it purports to show upon its face, because it is their own manifest turned over to this witness by their own employee,

(Testimony of R. P. Jandl.)

the very man that made the arrangements for the flight.

There is no question about where it came from; there is no question but what this was the man in charge of the east flight, and it seems to me if there is anybody that knows who was on the plane and would be the proper person to prepare the manifest, this would be the witness and the proper person that prepared it. It seems to me under those circumstances that it is the best evidence that is possible for us to produce here under the circumstances.

The Court: The objection made is sustained. The Court does not believe that the authenticating proof [104] meets the shopbook rule and it does not meet the rule of any statute that has been cited to the Court. There is a Federal statute on the subject, the terms of which have not been mentioned, and so far as anything that has been shown to the Court yet is concerned, I do not think the admissibility has been established.

I do not pretend to say that it could not be reasonably established; I merely say that on the proof submitted the ordinary shopbook rule has not been met, so far as its requirements are concerned, and I see nothing in the statute cited that should cause the Court to set aside the application of the ordinary shopbook rules of this situation. The objection is sustained.

I will say this for the consolation of counsel, if it is any, that in this case the Court has the assistance of the work of leading lawyers of the Seattle

(Testimony of R. P. Jandl.)

bar on both sides of the case, and in this instance it is no different from the usual instance of trial of cases generally, no matter how experienced the lawyers may be it seems seldom that lawyers are really thoroughly prepared or are able to meet adequately the ordinary shopbook rule which has been in existence since all of the time that we have had courts in this country. You may proceed.

Mr. Matthews: If the Court please, would your Honor [105] consider the admissibility of the record for proving the names of the passengers? This witness has testified that they are the same.

The Court: It depends on whether there is objection or not. Of course, if there is agreement between counsel about whether a document may be admitted, the Court is not concerned with admissibility then.

Mr. Cluck: As far as names are concerned, I think it has been made clear there will be no disagreement on that. We are glad to accommodate you and eliminate the necessity of going to such lengths of proving that particular matter.

The Court: There will be no admission in the absence of stipulation or withdrawal of objections. You may proceed.

Q. (By Mr. Matthews): Will you look at Exhibit A-7 which I have handed to you?

A. Yes.

Q. I will ask you if that is your signature?

A. Yes.

Q. Are you familiar with the signature of Mr. Houghton? A. Yes.

(Testimony of R. P. Jandl.)

Q. Does that stipulation cover the settlement that was made of all of the claims of the passengers that were on the attempted take-off of the eastbound flight? [106]

A. Yes.

Mr. Matthews: I will offer Defendant's Exhibit A-7 in evidence.

Mr. Cluck: We object, Your Honor. The only possible purpose of its being offered is to show the identity of the passengers, and we have just indicated to counsel that we are glad to accommodate him on that issue, and the witness, as a matter of fact, has already responded to those questions.

The Court: I do not recall that this record shows any statement by anybody as to who the passengers were on either of these flights.

Mr. Cluck: Your Honor, what this is, as explained by opposing counsel, is a settlement covering personal injuries in the crash. It has nothing to do with this lawsuit. The witness has been asked certain questions concerning the names of passengers on the west and eastbound flights as far as he knew them, and he said in substance, as I recall his testimony, that they were the same persons as far as he knew with the exception of one passenger.

We have also indicated that if during the noon hour there is any question in regard to identity of persons, as long as a stipulation is worded correctly and properly, we are glad to accommodate counsel on that, and it seems [107] to us that this matter of offering this particular stipulation has nothing

(Testimony of R. P. Jandl.)

whatever to do with the case and only encumbers the record and presents, if anything, confusion.

The Court: What have you to say, Mr. Cluck, on the identity of the parties mentioned in the agreement, Defendant's Exhibit A-7, and the passengers on these two flights?

Mr. Cluck: As I understand it, the stipulation covers all of the passengers that were in the plane at the time of its attempted take-off, and with one exception the same individuals as came west on one of the other flights.

The Court: Do you object to the admission of A-7 on the ground that that instrument is not anything that was made between the parties to the litigation now before the Court?

Mr. Cluck: It involved these parties, but it also involved other counsel, your Honor, and the point we make is that it is submitted for an entirely irrelevant purpose. If the purpose is to identify students on this aircraft, we have indicated that we are willing to have that point covered and we submit that the witness has already testified to it.

The Court: If the agreement which is Defendant's Exhibit A-7 was between the litigants in this action, in [108] my opinion it is admissible if it concerned any material issue. Do you deny that the agreement marked for identification Defendant's Exhibit A-7 was between the parties to this litigation?

Mr. Cluck: As I recall it, your Honor, that was a stipulation Mr. Houghton worked out relating to

(Testimony of R. P. Jandl.)

settlement of personal injuries as between the insurers and the different individuals who were on the aircraft, the administrator being concerned only in an incidental way to it, so that there are different parties involved; and moreover, we submit that the stipulation has no real bearing on the matter of identifying passengers, if that is the purpose of counsel, and that that particular point can be covered very simply and easily without any occasion for resorting to something so unrelated to that issue..

Mr. Houghton: I might say that the administrator was only a party incidentally, simply that the settlement made between the students and the insurance company should not prejudice or affect the rights under this hull coverage. The Government, which is a party to this action, and the second mortgagee, who are parties to this action, Breakiron, had nothing whatever to do with that stipulation. We are willing to have Mr. Matthews read the names of those students from the stipulation [109] into the record, the names that appear on there, and we will say that they were students on this flight at the time the plane wrecked, and that takes care of his purpose in putting it in.

The Court: Does that offer an acceptable substitute, Mr. Matthews?

Mr. Matthews: I think the stipulation is admissible.

The Court: I do not think so as against Breakiron. Breakiron was not a party to the stipulation.

Mr. Houghton: The Government was not a party.

(Testimony of R. P. Jandl.)

The Court: Was the Government a party to it?

Mr. Houghton: No, sir.

Mr. Matthews: It is admissible as against Jandl.

The Court: The administrator?

Mr. Matthews: Yes.

Mr. Cluck: For what purpose?

Mr. Matthews: To prove who was on the plane.

Mr. Houghton: Your Honor, we have agreed to let him state in open court who was on the plane and we will agree to it.

The Court: That agreement does not dispose of his right to have the document received in evidence as against the person against whom it is admissible.

Mr. Houghton: There is nothing in it that is detrimental to Jandl. [110]

The Court: The Court is of the opinion that so far as the administrator Jandl is concerned, the document is admissible in this case against him, but in view of the objection of other plaintiffs in this action, I will postpone ruling upon whether or not it is to be admitted in the case until I see what the final arrangements may be between counsel as to its admission as against all or only part, and you can make that final arrangement during the noon hour. Those connected with this case are excused until 1:30, and the Court is recessed until that time.

(At 12:02 o'clock p.m., Wednesday, October 11, 1950, proceedings recessed until 1:30 o'clock p.m., Wednesday, October 11, 1950.)

(Testimony of R. P. Jandl.)

Seattle, Washington—October 11, 1950, 1:30 P.M.

The Court: The witness who was on the stand will resume the stand for further interrogation.

Q. (By Mr. Matthews): Referring again to the westbound manifest, do you know what distribution—do you know how many copies of that manifest are made out? A. No, I don't.

Mr. Cluck: We object to any questions concerning [111] the westbound manifest as something not being in evidence.

The Court: As to this question, the objection is overruled. You may answer that.

A. No, I don't know how many copies are made.

Q. You are familiar with the fact that that is a record that is required to be made out by the rules of the Civil Aeronautics Authority? A. Yes.

Q. On each flight?

The Court: Do you expect the witness to answer the last clause of the question? Read the question.

(Last question read by reporter.)

A. Yes.

Q. Is this westbound manifest, Defendant's Exhibit A-6, the only westbound manifest that you have been able to locate?

Mr. Cluck: I object to the form of the question as implying that the paper designated westbound manifest has any status at all, because the witness is shown not to have been qualified to testify to it.

The Court: The objection is overruled. This, as

(Testimony of R. P. Jandl.)

I understand, is interrogation of the witness called as an adverse witness.

Q. Would the reporter read the question, please?

(Last question read by reporter.)

The Court: I do not think your question is definite [112] enough. Do you mean, for instance, your office or my office or where, if anywhere?

Mr. Matthews: I will rephrase the question.

Q. You have previously testified that Defendant's Exhibit A-6, the westbound manifest, was turned over to you by Mr. Keith? A. Yes.

Q. The eastern representative of Mr. Leland?

A. Yes.

Q. Who arranged this flight? Did he turn over to you any other westbound manifest besides this one?

A. No, that is the only one he turned over.

Q. Did you find in the records and files in Mr. Leland's office any other westbound manifest besides this one?

A. I don't recall any others at this time, no, but everything was gone through by everybody. That makes it rather difficult to answer that question directly.

Q. You spoke about the CAA or CAB taking some records from the office? A. Yes.

Q. Were not all those records returned to you?

A. I do not believe so, but I don't know, because I never had a receipt for them in the first place. I turned over the files to them and says, "Here it is. Take what you want." [113]

(Testimony of R. P. Jandl.)

Q. Did you ever get a letter from the CAB releasing all the records to you?

A. I got a letter, but I never got any records back. All I got was a few manifests.

Q. Do you remember what the letter said?

A. No.

Q. Do you have a copy of the letter?

A. No.

Q. What did you do with it?

A. I don't know. It might be in the stack of files I have at home, I do not know.

Q. In the stack of files you have at home?

A. Yes.

Q. You stated in answer to a request for admission that a number of records had been turned over to the CAB and you have not been able to get them back. Am I correct in so understanding your testimony?

A. I believe I forgot what the admission said, but I think that is what it was, yes.

Q. Isn't it a fact that none of the originals were introduced in evidence in the CAB hearing but photostatic copies were made and that all of the originals were returned to you?

A. I don't know. If they were, I can't find them now.

Q. Didn't Mr. Cuddeback write you a letter releasing [114] to you all of the original records that had been taken from you by the CAB?

A. I don't know. I would like to see the letter if he did.

(Testimony of R. P. Jandl.)

Q. You don't remember any such letter?

A. I don't remember the letter, no.

Q. You don't remember him returning any documents to you, or releasing any documents to you?

A. I remember his giving me a file of manifests of 79025 which I had. I could find that bunch of documents, but nothing relating to this flight.

Q. Did you make any effort to get the records back after he told you you could have them back?

A. I don't recall.

Q. You stated in your answer to our request for admissions that the originals were in Washington, D. C.

Mr. Houghton: I don't think he said that.

Q. Maybe I am mistaken. On page four of the answer to request for admissions, which is over your sworn statement, you state: "On January 3 and 4, 1949, the plaintiff Administrator delivered to a representative of the Civil Aeronautics Administration all available records pertaining to Aircraft NC79025 for the period 1947 and 1948, including all logs, log books and maintenance and operations records that could be found. These were not examined by any of the plaintiffs [115] and none of the plaintiffs have any personal knowledge regarding their contents. They were never returned." Is that a true statement?

A. Yes, I don't know what happened to them. Somebody must have grabbed them and it must have been the CAA, because they were asking for them.

Q. You go on to say: "After plaintiffs were

(Testimony of R. P. Jandl.)

served with defendants' request for admission under Rule 36 they inquired of the Seattle representatives of the Civil Aeronautics Administration and learned that, as far as can be determined from local sources, all of these documents were sent to Washington, D. C., and deposited there in the record section of the Civil Aeronautics Administration." Who made that statement to you?

A. Mr. Cuddeback, I believe.

Mr. Houghton: I object to the form of that question. The answer does not say anybody made that statement to him. It is an answer on behalf of all of these plaintiffs and the statement to their counsel would be sufficient on that. He doesn't claim in this paper anybody made that statement to him.

Mr. Matthews: I thought he just testified Mr. Cuddeback did make that statement.

Mr. Houghton: Maybe he did, but he doesn't say in this paper anybody made the statement to [116] him.

The Court: The objection is sustained. Make it clear in your question you are relating to what he said about Mr. Cuddeback rather than what he said in the paper by way of answer to requests for admission.

Q. It is your testimony that you had a conversation with Mr. Cuddeback to try and locate these records that I asked you to produce?

A. Yes.

Q. What do you claim he told you?

A. He told me he didn't have them. He went through his files; he didn't have them.

(Testimony of R. P. Jandl.)

Q. Did he make any statement to you that they were in Washington, D. C.?

A. Not to my knowledge, no. I don't recall.

Q. You verified under oath the answer to these requests for admissions in which it is stated that as far as can be determined from local sources all of these documents were sent to Washington, D. C., is that right?

A. If it is in there, it must be.

Q. Did you read this answer to our requests for admission before you signed it?

A. I read it, yes, but I don't recall—you are asking me to recite something that I signed four or five weeks ago, and it is making it rather difficult.

Q. Would you like to see the original before you answer [117] the question?

A. I would like to see what I admitted before I say yes.

The Court: Does anybody at counsel table have a copy you could lend the witness?

Q. Will you look at page 4, starting at line 11, and will you read the sentence that starts in the middle of that line, "After plaintiffs were served with defendants' request."

A. "After plaintiffs were served with defendants' request for admission under Rule 36 they inquired of the Seattle representatives of the Civil Aeronautics Administration and learned that, as far as can be determined from local sources, all of these documents were sent to Washington, D. C.,

(Testimony of R. P. Jandl.)

and deposited there in the record section of the Civil Aeronautics Administration.”

The Court: Was your request to have this witness read that answer into the record of the case? It has already been previously read into the record. Make your meaning specific. I think what you meant was to ask him to read that over to himself silently so that he would be prepared to answer your further interrogation. What you have instead is another repetition of that same long statement in the record, which in the case of appeal whoever appeals will have the opportunity of paying for, and there is no need of it. [118]

Mr. Matthews: I intended just to have him refresh his recollection.

The Court: Do you wish to ask him a question based upon that information with which his mind may now be refreshed?

Mr. Matthews: Yes.

Q. (By Mr. Matthews): Did you sign and swear to under oath the answer to defendants' request which contains the statement that you have just read? A. Yes.

Q. Did anyone tell you that the originals are in Washington, D. C.?

Mr. Houghton: Just a minute. He doesn't say anybody told him. This is an answer he verifies on behalf of all of the plaintiffs, prepared by his counsel, and if his counsel made that inquiry and told him that is what they said, I think he had a right to verify it. Someone must verify it. These

(Testimony of R. P. Jandl.)

things couldn't all be within his own personal knowledge.

The Court: The objection is overruled. Read the question.

(Last question read by reporter.)

A. Not directly. It is through Mr. Houghton, the counsel.

Q. In response to our request, did you make any effort yourself to find these documents that I asked you to produce [119] or did you just leave it up to Mr. Houghton?

A. I left it up to Mr. Houghton.

Mr. Houghton: Just a minute. I am wondering if he is still talking about the same thing. He was just talking about this long document here, the preparation of which was left up to his counsel. I just wanted to find out if he understands what counsel is talking about now, apparently not this document, but documents that he was subpoenaed to bring into court.

The Court: The Court sustains the statement as and for an objection and asks interrogating counsel to clarify his question.

Q. I am referring to the statement contained in your answer to our request for admission to the effect that: "On January 3 and 4, 1949, the plaintiff Administrator"—who would be you—"delivered to a representatives of the Civil Aeronautics Administration all available records pertaining to Aircraft NC79025 for the period 1947 and 1948, including

(Testimony of R. P. Jandl.)

all logs, log books and maintenance and operations records that could be found." Is it your statement that none of these records I have just referred to were returned to you?

A. The statement is stated in here, yes, but since then, since you subpoenaed these documents, I was going through three or four times and in the process of going through the [120] files I found a couple of files of manifests on 79025 which I believe were returned to me by Mr. Cuddeback.

Q. Where did you find those records?

A. In the file of correspondence and other things that I have in my home.

Q. You didn't bring that file with you?

A. I believe I did.

Q. Do you have it here now?

A. Yes, it is here somewhere.

Q. Would you object if I examined it?

A. No objection with me, no.

The Court: You may step down, Mr. Witness, and deliver the file to counsel who asked for it. Is there any part of it you wish to call to the attention of your counsel?

Mr. Houghton: We would like to find out what it is that is wanted.

The Court: You may discuss it together for a moment.

Q. (By Mr. Matthews): Have you any other records besides these two bundles you have given me?

The Court: The witness will resume the stand.

(Testimony of R. P. Jandl.)

The direction of the Court that he hand to interrogating counsel the documents mentioned in the recent question and answer has been accomplished. You may now proceed.

Mr. Matthews: May I have this marked for identification? [121]

The Court: The witness a few moments ago in an aside statement referred to what is now being handed to the clerk for placing thereon identifying marks as the charred remains of the what?

The Witness: Of the operations manual.

(Charred records marked Defendant's Exhibit A-8 for identification.)

The Witness: Here is a couple of charred ones that were part of the requested stuff to be subpoenaed.

Mr. Cluck: If your Honor please, I hesitate even to handle this material here. Perhaps the witness could tell us what it is if we had a short recess.

The Court: Let him do it now. The Court hoped some of these matters could be disposed of during the noon hour, and they have not been. We will have to proceed. Let these papers mentioned by the witness in his last statement be added and now deposited with Defendant's Exhibit A-8. Will the witness step down and take in his hands the papers he last referred to and which the Court last referred to and attend to the passing from his hand of that group of papers to the group of papers re-

(Testimony of R. P. Jandl.)

ferred to marked Exhibit A-8? When that is done, I wish the witness to resume the stand. Mr. Witness, have you done what the Court requested you to do?

The Witness: I didn't get your question. [122]

The Court: Take in your hands the papers you had in your hands when you were on the witness stand a few moments ago when you made the offer to make them part of Defendant's Exhibit A-8. Are those the papers?

The Witness: Yes.

The Court: Will you deposit those papers into the group of papers which previously have been marked Defendant's Exhibit A-8? Have you done that?

The Witness: Yes.

The Court: You may resume the stand. Proceed with the interrogation. They are all now a part of Defendant's Exhibit A-8 for identification. Do not take any part of Exhibit A-8 apart. It is in the clerk's care.

(Folder of manifests marked Defendant's Exhibit A-9 for identification.)

(Folder of manifests marked Defendant's Exhibit A-10 for identification.)

Q. (By Mr. Matthews): Referring to Exhibit A-8, which is the bundle of papers that are burned on the edges, were they taken from this airplane?

A. Mr. Cuddeback gave them to me. I never took them, no. As far as I know, they were.

(Testimony of R. P. Jandl.)

The Court: Where, if you know, have they been kept since Mr. Cuddeback gave them to you?

The Witness: They were put in the transfer cases [123] and I took them all to my home, in the basement.

The Court: Have they been in your custody ever since?

The Witness: Yes.

The Court: Have you kept them in your custody as files and business records of the Leland partnership, or of Mr. Leland?

The Witness: Yes.

Q. (By Mr. Matthews): Handing you what has been marked as Exhibit A-9, state what that folder contains generally.

A. It contains miscellaneous data, manifests.

Q. If I counted correctly, there are about 23 manifests in that folder? A. Yes.

Q. Are those manifests that are in that folder manifests that were kept by Mr. Leland in the regular course of his business?

Mr. Houghton: If you know.

A. I don't know.

Q. Is that folder a part of the records of Mr. Leland which came into your possession as administrator of the estate? A. Yes.

Q. During the years that you represented Mr. Leland, did you have access to those records?

A. I had access to them, yes.

Q. Did you take them from his office after you were [124] appointed administrator?

A. Mr. Cuddeback returned these to me and I

(Testimony of R. P. Jandl.)

put them in the file and took them from the office and put them in my home.

Q. Did you originally deliver them to Mr. Cuddeback?

A. I don't recall. In fact, I am quite sure I did not.

The Court: The only way that these questions can be made and the answers can be made helpful on the question of whether any document is admissible is in connection with establishing what the fact is with reference to whether these were the business records of Mr. Leland and whether they were made by some employee of Mr. Leland with relation to the performance by him of some necessary business or occupational duty and whether or not they were made by any such employee in the ordinary business course of such employment and what use of them since they were made has been made, whether they were used by the business in the ordinary course of the business, whether they were kept for that purpose, whether they have been preserved as and for business records for any and all needed business uses—those are some of the questions which may properly pertain to counsel's efforts to authenticate them for admissibility, and in respect to several instances such evidence is in the main lacking. Proceed.

Q. (By Mr. Matthews): It was the practice of Mr. Leland [125] to keep a manifest covering each flight, was it not? A. Yes.

Q. And those manifests were kept in the office?

(Testimony of R. P. Jandl.)

A. They were kept in the office, yes.

Q. And those manifests which you have in your hand are part of those manifests which were kept by Mr. Leland in the ordinary course of his business?

Mr. Houghton: Should that be accompanied by "if he knows"?

The Court: This, as I say, is in the nature of cross-examination because this witness was called as an adverse witness. It is often difficult to keep that situation in mind.

The Witness: State the question again, please.

(Last question read by reporter.)

The Witness: I don't know.

Mr. Houghton: Might I suggest this, your Honor, Mr. Jandl is an officer of the court. You don't make a man an adverse witness simply by calling him an adverse witness. He is an administrator serving under order of the Superior Court of King County, and I think his examination is subject to the same rules as any other witness, and that they are not entitled to call him as an adverse witness.

The Court: The rules applying to calling of adverse [126] witnesses in this court apply to an adverse party. I believe that the records and files in this case show Mr. Jandl is an adverse party, adverse to those litigants represented by Mr. Matthews, the attorney now examining.

I am not aware of any exception in the rule relating to the right to call an adversary party as

(Testimony of R. P. Jandl.)

an adverse witness because of the fact that the person called to the witness stand happens to be acting in a representative capacity by appointment of some court. Unless you have some judicial authority binding on this Court to the contrary, the Court will have to rule against the contention stated by Mr. Houghton in his last statement.

Q. (By Mr. Matthews): Mr. Jandl, you have previously stated you knew that the requirements of the Civil Aeronautics Administration required the making out of a manifest covering each flight, is that right? A. Yes.

Q. So far as you know, are these the manifests that were made out and kept in the office pursuant to that statutory requirement?

A. As far as I know, yes.

Q. Does the same thing apply to Defendant's Exhibit A-6, the westbound manifest?

The Court: Show him A-6.

Q. That covered the westbound flight of these Yale boys, [127] the one turned over to you by Mr. Keith?

Mr. Cluck: I object to that question, your Honor, because it has been covered. He said it was handed to him by Mr. Keith and that is all he knew about it.

The Court: The objection is overruled. Read the question.

(Last question read by reporter.)

The Witness: As far as I know, yes.

Q. Is it customary to make out those manifests

(Testimony of R. P. Jandl.)

at the time of the flight or within a reasonable time thereafter? A. Yes, as far as I know.

Q. This Defendant's Exhibit A-6, after it was turned over to you by Mr. Keith, you placed it as a part of the business records of Mr. Leland in his files? A. Yes.

The Court: What was your relationship to Mr. Leland's business at the time Mr. Keith delivered to you Defendant's Exhibit A-6?

The Witness: Administrator.

Q. I notice that none of the manifests that are in the file which has been identified as Defendant's Exhibit A-9 are signed by anyone, is that correct?

A. Apparently not.

Q. Is the form that is used for all those other exhibits that are found in A-9 the same as the form, the printed form, [128] that was used on Exhibit A-6, which covered the westbound flight of the Yale boys? A. Yes.

Q. Calling your attention to Defendant's Exhibit A-10, do you find a number of manifests in that folder? A. Yes.

Q. Are they the same type of manifest as Defendant's Exhibit A-6? A. Yes.

Q. Kept in the same way on the same form?

A. Yes.

Q. Without any signature?

A. You are speaking of manifests?

Q. Yes. A. Yes.

Q. They were also part of the business records

(Testimony of R. P. Jandl.)

which were turned over to you as administrator of the estate? A. Yes.

Q. And you have since kept them as such?

A. Yes.

Q. Is there any difference in the form in which Exhibit A-6, which is the westbound manifest covering the flight of the Yale boys, is kept and the manner in which all these other manifests were kept as appears from those records?

A. Is there any difference? [129]

Q. Yes. Except as to names and weights and so forth, are they both kept in the same way?

A. It appears so, yes.

Mr. Matthews: That is all. I would like to offer at this time, re-offer Defendant's Exhibit A-6 in conformity with Sec. 1732 of Title 28, which I believe I covered. I have tried to follow the statute, and I believe the witness has stated in answer to my questions answers which make that admissible. Would the Court care to hear that statute?

The Court: Is there any objection to the offer?

Mr. Cluck: We renew our objection, your Honor, and we have likewise referred during the noon hour to Sec. 1732 and believe that statute applicable.

The Court: The Court believes that this Exhibit A-6 has been properly authenticated by the proof already adduced, and the objections to its admission are overruled and Defendant's Exhibit A-6 is now admitted.

(Defendant's Exhibit A-6 received in evidence.)

TO: Mid-epor to Minnie CAPTAIN Hoyt 1ST OFFICER Ray
 FROM: Minnie TO Sea CAPTAIN Renell 1ST OFFICER Tomas
 TYPE: DOUG MAKE, MODEL: G-3 PT. DEPT: Idceport ROUTE: G-3, G-2 PT. DEST: Sea
 STOPS: ENROUTE CHI, Linn, Bil E.T.A. DEST. 1700 HRS. FUEL ABOARD 4

PASSENGER	ADDRESS	PERM. UT.	BAG. NO.	DEST.	FARE	TKT. NO.	U"
1. Reesc, O.G.	7709 23rd Seattle	160	35	Sea	THIS MANIFEST WILL BE USED IN PLACE OF TICKETS		
2. Wickman, L.B.	Bellvue, Wash.	155	30	"	SPECIAL STUDENT CHARTER		
3. Anderson, T.	1435 Pk Lane, Spc	150	40	"	SPECIAL STUDENT CHARTER		
4. Brown, M.	1216 24th N. Sea	145	25	"			
5. Smith, J.	1894 38th St.	165	35	"			
6. Schack, J.	120 Lynn St. Sea	160	40	"			
7. Lynch, J.	2216 Deacon Ave Seal	140	35	"			
8. Thompson, T.	Cedar Falls Wn.	155	30	"			
9. Knoll, J.	1918 2nd Blvd	135	25	"			
10. Wilson, O.	4511 Emberson, Seal	150	30	"			
11. Roderick, J.	1230 15 N. Sea.	165	35	"			
12. Franzheim, H.	140 1st. Wash Blvd	170	20	"			
13. Carrett, D.L.	Portland Ore	155	40	"			
14. Laird, R.	Comas, Wash.	155	40	"			
15. Bryan, J.	6309 2nd, Portland	145	30	"			
16. Biddle, J.	1085 1st St.	175	35	"			
17. Bjork, R.	Astoria, Wash	150	40	"			
18. Engle, C.	1141 37th N. Sea	160	35	"			
19. Haerle, D.B.	Portland Oregon	165	35	"			
20. Cole, G.	6516 17th NW, Sea	155	30	"			
21. Young, R.	3836 45th S., Sea	160	40	"			
22. Hartley, M.	Seattle Box 127 Mercer I.	155	35	"			
23. Campbell, D.	R #1 Solah, Wn.	135	40	"			
24. Kendall, J.	3913 W Hanford Seal	180	35	"			
25. Palmer, R.H.	R #3 Vancouver Wn	150	30	"			
26. Bellnap, C.	Portland, Ore	145	40	"			
27. Howe, W.	1124 Bernard St, Wash	165	40	"			
28. Adams, R.	3857 Jackson St.	160	25	"			

Per \$4200

Ct: xxx

Ct: xxx

Monies to carrier including tax. ----\$3470.00

Paid by check by Air Travel Inc. 12/16/48

 MADE 2401
 OF TRIP: ADMITTED EXHIBIT 2-6
 ADMITTED OCT 11 1950

(Testimony of R. P. Jandl.)

The Court: Did your statement include an offer of A-7, A-8, A-9 and A-10? I think you should offer each one separately so that counsel and the Court could deal with each one.

Mr. Matthews: We will offer Defendant's Exhibit A-8. [130]

The Court: That is the charred remains of the operations manual.

Mr. Cluck: We object, your Honor, on the same grounds as those previously indicated.

The Court: The objection is overruled. Defendant's Exhibit A-8 is now admitted.

(Defendant's Exhibit A-8 received in evidence.)

Mr. Matthews: We offer Defendant's Exhibit A-9.

Mr. Cluck: That is the file?

Mr. Matthews: The file of manifests, similar to Exhibit A-6.

Mr. Cluck: We make our objection to that on the additional ground that that file contained a number of papers, many of which relate to transactions not even claimed by defendants to be bearing on the one at hand, except as they may illustrate some similarity on the markings on the papers in the file.

The Court: Do you wish to clarify the purpose for which you offer these by an additional statement?

Mr. Matthews: The only purpose of offering it is to show the manifest A-6 is kept in exactly the

(Testimony of R. P. Jandl.)

same manner and form as all of the other manifests that appear in Exhibit A-9, as a regular business record.

The Court: The objection to A-9 is overruled and [131] that exhibit is now admitted.

(Defendant's Exhibit A-9 received in evidence.)

Mr. Matthews: We offer in evidence Defendant's Exhibit A-10 for the same reason, same purpose.

The Court: Is it the same kind of material——

Mr. Matthews: Yes, your Honor.

The Court: ——as that in A-9? Do you make the same objection to A-10, Mr. Cluck?

Mr. Cluck: Yes, and further that the file contains papers even designated in other business, Arnold Air Service, which do not have any bearing at all, even in form or similarity of form, to the present.

The Court: Insofar as it relates to other business other than Mr. Leland's business, those parts of it are excluded and not admitted and the Court will give no consideration to any such papers which may now be physically in the file, but in respect to all parts of it which relate to the business of W. F. Leland, deceased, the objection is overruled and Defendant's Exhibit A-10 is now admitted.

(Defendant's Exhibit A-10 received in evidence.)

(Testimony of R. P. Jandl.)

Mr. Matthews: No further questions of this witness.

The Court: He being called as an adverse witness, [132] the plaintiff may ask certain questions pertaining to the questions asked on direct. Plaintiffs' counsel are reminded that they have the right to call this witness as their own witness on these or any other matters without any limitation of scope of inquiry of the witness.

Cross-Examination

By Mr. Chuck:

Q. Who was this Mr. Keith that you mentioned that handed over the manifest to you?

A. He was Mr. Leland's eastern representative.

Q. Where did he live?

A. He was living in New York, in the vicinity.

Q. When you say eastern representative, what do you mean by that?

A. He was handling Mr. Leland's affairs in the East, endeavoring to obtain business.

Q. What were his duties?

A. Principally sales and obtaining loads for the plane.

Q. Obtaining business for the company, is that it?

A. That is right.

Q. Did he have anything to do with the operations of the aircraft in respect of loading passengers or freight?

A. He would be present at the field at the time it was done, at the time the plane was loaded.

(Testimony of R. P. Jandl.)

Q. Do you know who in the East took the weights of [133] passengers or cargo as it was put on the planes? A. No, I don't.

Q. Do you know whether Keith did that?

A. No.

Q. He did not, or do you know?

A. I don't know.

Q. Do you know anything at all otherwise about the matter of entering weights on the manifests so far as East Coast operations are concerned?

A. No, I don't know anything because I wasn't there.

Q. When you received that paper, you were administrator of Leland's estate, is that correct?

A. Yes.

Q. What did you do with it when you got it?

A. Placed it in the files.

Q. Placed it in the files along with his other effects, is that it? A. That is right.

Q. Do you know anything more about the paper at all?

A. Not other than what is on the paper itself.

Q. Do you know who was in charge of Mr. Leland's actual flight operations in the East?

A. No.

Q. Did he have someone charged with that responsibility? A. Usually it was—— [134]

Mr. Matthews: I object to what it was usually, unless it refers to this specific flight.

The Witness: The answer is no, then.

(Testimony of R. P. Jandl.)

Q. By whom was the operation handled as far as disposition of passengers, and so forth, is concerned, do you know that?

A. The pilots generally took care of that, assisted by Mr. Keith if he was there.

Q. What did the pilot do generally?

Mr. Matthews: On this particular flight?

Mr. Cluck: I am asking the business practice in regard to the loading of the ship.

The Witness: The pilot would make up the manifest and his weight and balance.

Q. Do you know what the terms of employment of Mr. Keith were? Do you know of any paper where his duties are set forth or any source of information from which the extent of his duties may be gained?

A. Not right now, no. Not without looking.

Q. With regard to these other papers, let's refer first to the operations manual. You said that was handed to you by Mr. Cuddeback, is that right?

A. Yes.

Q. Did you have anything further to do with it?

A. No.

Q. Was that the first time you had had occasion to see [135] it, or had you seen——

A. That is the first time I saw it.

Q. How did it happen Mr. Cuddeback handed it to you?

A. He said this goes along with these other papers that he returned in connection with returning the records.

(Testimony of R. P. Jandl.)

Q. Did you at any time in the course of your dealings with Mr. Leland have duties other than those of an accounting or advisory nature that you mentioned this morning? A. No.

Q. You had nothing to do with operations?

A. No.

Q. Did you have a personal knowledge of any of the papers that have been offered here as exhibits, personal knowledge of their contents?

A. You mean did I look at them before I brought them up here?

Q. No. Did you have any personal knowledge as to the manner of preparation, for example; do you know who prepared them? A. No, I don't.

Q. Do you have occasion in the course of any of your connections with the business to check on the correctness of the entries in any of them?

A. Only insofar as collections were concerned, to determine that each fare was—— [136]

Q. What records did you deal with on that?

A. Duplicate copies of the tickets.

Q. What kind of tickets?

A. In the case of common carriage, you sell one ticket to each passenger and you have to account for that in the manifest, be sure that that passenger went and the fare was collected for him.

Q. In connection with your accounting work, what books, records, would come ordinarily within the scope of your duties to handle, that Mr. Leland had?

(Testimony of R. P. Jandl.)

A. Generally any copy of a manifest pertaining to common carriage loads, exclusive of charters, and tickets pertaining to that manifest. That is about all that I would handle, other than invoices and checks and stuff like that.

Mr. Cluck: That is all.

Mr. Matthews: That is all.

Mr. Cluck: Just one question, if the Court please. Had Leland's business been discontinued or had it not when you received what was identified as Exhibit A-6?

The Witness: It was discontinued.

Mr. Cluck: At what date was it discontinued?

The Witness: Immediately after I became the administrator.

Mr. Cluck: That is all.

The Court: May I suggest that in this case more than [137] others I notice that there have more often arisen occasions when the counsel taking the laboring oar found it needful to leave the room. I would like to say in protection of such counsel, as well as the proper proceedings in the case, that I think counsel should not leave the room without having some definite arrangement made, because something might happen while counsel is absent from the room, and if it was not brought to his attention and there came up any point involving what occurred later on, he might be either at a disadvantage or some action might be taken by the Court to his prejudice, so I ask that counsel in the case, and

particularly those taking the laboring oar, try to avoid the necessity of leaving the room except at the recess periods unless you get permission. If you feel the occasion is likely to arise often and the importance of it is great, if you care to make an arrangement now on the plaintiffs' side, if either Mr. Dennis or Mr. Houghton or Mr. Cluck is present, the Court may proceed without any concern as to the absence of any one of the other of those gentlemen, and on defendants' side, if you care to arrange that so long as any one of counsel now present is here the Court may proceed with the understanding the Court is authorized to proceed in the absence of any one of the others. [138]

Mr. Matthews: That is agreeable with defendants.

Mr. Dennis: In my absence, either Mr. Houghton or either one of the counsel can act for the Government.

Mr. Cluck: That is agreeable as far as counsel for plaintiffs are concerned.

The Court: Is the Court's statement agreeable so far as each of the three of counsel appearing for plaintiff is concerned?

Mr. Houghton: Yes, it is.

The Court: Is the Court's statement agreeable to defendants as far as each of the three counsel are concerned?

Mr. Matthews: Yes, your Honor.

The Court: On the defendants' side, if either

Mr. Wilkerson, Mr. Matthews or Mr. Sax is present, the Court may proceed.

Mr. Matthews: Yes.

LEON D. CUDDEBACK

called as a witness by and on behalf of defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Matthews:

Q. Will you state your name? [139]

A. Leon D. Cuddeback.

Q. What is your occupation?

A. I am chief of the region for the Bureau of Safety Investigation of the Civil Aeronautics Board.

Q. Stationed here in Seattle? A. Yes, sir.

Q. What connection did you have, if any, with the investigation of the crash of a certain Douglas DC-3 airplane No. NC 79025 which crashed at Boeing Field, on January 2, 1949?

A. The Civil Aeronautics Board is charged by law with the investigation of aircraft accidents, civil aircraft accidents of airplanes of American registry, and as chief of the region in this area I am charged with that responsibility by the Board.

Q. Did you so act in connection with the investigation of this accident?

Mr. Cluck: We object to this and any further

(Testimony of Leon D. Cuddeback.)

questions upon the grounds previously indicated. What this witness has done with respect to any CAA investigation is not a part of this particular proceeding.

Mr. Matthews: Our position, your Honor, is that the statute does not prohibit the witness as an individual from testifying as to what he did, but it only applies to the findings and the report of the CAB.

The Court: It would be very helpful to the [140] Court in ruling on this objection if counsel on either side had any authority they could point to. I am going to have to apply the statute unless counsel show me some sort of authority that clarifies it. I am going to have to apply the statute to this the same as the other.

Mr. Matthews: Your Honor, as we read the statute, and we may be wrong, the statute only applies to the report of the Board and does not prohibit——

The Court: Will you read the statute, please? It would be very useful if you had investigated the court decisions on this point to see if there are any. Someone might ask the witness either formally or informally if by chance he is a lawyer, if he knows of any authorities on the point.

Mr. Wilkerson: I might say to the Court that I did make a search for authorities and found none either way, except I believe that the plain wording of the statute itself excludes only the report and the findings.

(Testimony of Leon D. Cuddeback.)

The Court: It is difficult for me to appreciate how he could make a finding that would be disconnected from his official capacity.

Mr. Wilkerson: Mr. Cluck has handed me a portion of the statute which reads: “. . . no part of any report or reports of the Civil Aeronautics Board relating to any accident, or the investigation thereof, shall be [141] admitted as evidence or used in any suit or action for damages growing out of any matter mentioned in such report or reports.”

Obviously, if you ask the witness what he knows within his own knowledge, that is not a part of the report or reports of the Civil Aeronautics Board relating to an accident.

The Court: Does the report have to be made orally or in writing to be covered by the provisions of the statute?

Mr. Wilkerson: Another section of the statute requires the Board to make the report in writing concerning the accident.

The Court: You think that is the report mentioned in the statute?

Mr. Wilkerson: I think it is, your Honor.

Mr. Houghton: Your Honor, might I say this: what we have here is just an extract of the statute, with stars, and it was prepared—something that was typed off in connection with the King County case, where the only thing at issue was the formal report, so I don't think this is all the statute.

The Court: What is the statute citation?

(Testimony of Leon D. Cuddeback.)

Mr. Houghton: 49 U.S.C.A., Sec. 581, and I think this is just a small part of it. [142]

The Court: Would you be willing to be excused and go with the bailiff to the Judge's chambers and see if you can get that statute? I do not have it on my desk.

Mr. Cluck: We just sent the bailiff after it, your Honor.

The Court: I would suggest that at the next recess counsel arm themselves with the books which contain all statutes which are involved, all statutes or administrative regulations, which you claim are involved in this proceeding so that you can have them on counsel table for use in any occasion similar to this.

Proceed. The Court will reserve ruling. Take up something else.

Mr. Wilkerson: I believe we will have to call another witness, Your Honor.

The Court: Step down. Call another witness.

Mr. Houghton: Your Honor, may Mr. Jandl be excused for the rest of the afternoon? He is the plaintiff, of course, one of the plaintiffs.

The Court: I doubt that he should be. Things will probably take place that he should be here. I deny that request.

Mr. Matthews: Call Mr. Miner. [143]